"A Right of First Importance": Habeas Corpus During the War on Terror

“A Right of First Importance”: Habeas Corpus during the War on Terror

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Abstract

The U.S. Supreme Court's behavior during the War on Terror represents a stark contrast from how the Court has previously viewed its responsibilities during wartime, especially as they relate to the treatment of noncitizens detained abroad. The Court has traditionally avoided questioning presidential policies on the capture and detention of suspected enemies during times of conflict. It has used its control over its own docket to refuse review of lower-court decisions dismissing challenges to foreign-policy decisions based on dubious claims of their involving "political questions" or being outside the domain of judicial authority. And, until the War on Terror, it drew a bright-line rule that seemed to categorically exclude noncitizens detained abroad from constitutional protection. However, in a series of cases from 2004 to 2008, the Court reversed its World War II–era doctrines that had permitted the federal government extensive discretion in its treatment of detainees captured during times of hostilities. The culmination of these decisions was its 2008 holding that foreign nationals detained at Guantanamo Bay have a constitutional right to habeas corpus hearings to challenge their detentions.

This dissertation provides a normative defense of the Court's decision-making process in its War on Terror habeas corpus cases. It reconstructs and analyzes the Court's central arguments and shows the ethical significance of its assertion of an important judicial role in overseeing executive detention during wartime. In the process, it also provides an explanation and defense of the Court's decision to stray from its World War II–era doctrines limiting the reach of the writ of habeas corpus and, by extension, of the Court's ability to step in and defend the rights of foreign nationals abroad.

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"The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law."

–Justice Anthony Kennedy, *Boumediene v. Bush*[*]

*553 U.S. 723, 798 (2008).

Introduction: The Supreme Court's Intervention in the War on Terror

Writing in the mid-twentieth century, political scientist Clinton Rossiter reviewed the Supreme Court's role during World War II and predicted, "As in the past, so in the future, [the] President and Congress will fight our wars with little or no thought about a reckoning with the Supreme Court."[1] Rossiter apparently spoke too soon: During the War on Terror,[2] the Supreme Court has repeatedly intervened to assert its prerogative to review the treatment of individuals that the United States has detained as suspected terrorists, including foreign nationals captured overseas. In a series of cases spanning four years, the Court reversed its World War II-era doctrines permitting the federal government extensive discretion in its treatment of detainees captured during times of hostilities. In 2004, the Court held that American citizens could not be detained indefinitely without judicial process (*Hamdi v. Rumsfeld*[3]) and that foreign nationals detained at Guantanamo Bay were not entirely barred from access to U.S. courts during wartime (*Rasul v. Bush*[4]); in 2006, the Court struck down the president's attempt to set up military commissions, absent congressional authorization, to try detainees (*Hamdan v. Rumsfeld*[5]); and in 2008, the Court decided that Guantanamo detainees have a

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1. Clinton Rossiter, *The Supreme Court and the Commander in Chief* (Ithaca, NY: Cornell University Press, 1951), 131.

2. I employ the term "War on Terror" because of its widespread use as a general descriptor of the United States' response to the September 11, 2001 terrorist attacks. This is not meant to endorse the framing of the fight against terrorism as a "war," a conceptualization that is heavily criticized in Chapter III.

3. 542 U.S. 507 (2004) (plurality opinion).

4. 542 U.S. 466 (2004).

5. 548 U.S. 557 (2006).

constitutional right to habeas corpus hearings to challenge their detentions (*Boumediene v. Bush*).

These cases represented a stark contrast from how the Court has previously viewed its responsibilities during wartime, especially as they relate to foreign policy. The Court has traditionally avoided questioning the legitimacy of presidential actions abroad, including the capture and detention of suspected enemies during times of conflict. It has used its control over its own docket, through its discretionary grant of *certiorari*, to refuse review of lower-court decisions dismissing challenges to foreign policy decisions based on dubious claims of their involving "political questions"[7] or being outside the domain of judicial authority. And it drew a bright-line rule that, until 2008, seemed to categorically exclude noncitizens detained abroad from constitutional protection.

The recent War on Terror cases are particularly hard to reconcile with the Court's precedents from World War II–era cases dealing with the rights of foreign nationals abroad. During and immediately after that conflict, the Court expressed a strong desire to avoid challenging the elected branches, especially the presidency, in its execution of the war and its handling of postconflict military tribunals for Axis members. Consequently, the Court often went out of its way to legitimize the president's actions, either by finding them in keeping with longstanding principles of warfare (the "law of war"), or by declaring that foreign nationals abroad who were affected had no right to use the U.S. court system to challenge their treatment. In the War on Terror cases, the Court, while paying lip service to many of these precedents, displayed a starkly different understanding of both the rights of foreign nationals abroad and its role in vindicating

7. See Chapter II.

those rights. It showed a willingness to challenge both the presidency and Congress in their determinations of detention policies, as well as a recognition that constitutional protections may apply even to those with no preexisting relationship with the U.S. government.

Why has the Supreme Court decided to involve itself in wartime issues of foreign policy, an area which it has traditionally deemed outside both its institutional competence and constitutional authority? Why has it reversed decades-old doctrine holding that foreign nationals detained abroad by the U.S. government are categorically excluded from constitutional protections? And why does it (and should it) view its role in the War on Terror so differently than did the Court during and after the Second World War? Perhaps a central concern with the War on Terror cases is that the Court has done a poor job at describing its reasoning and thus the validity of many of its decisions. *Rasul*, for instance, came across to many as "questionable" in its reasoning and "skewed" and "puzzling" in its conclusions.[8] In *Boumediene*, Justice Kennedy's decision seemed vague and divorced from precedent, especially when placed side-by-side with Justice Scalia's more straightforward (if histrionic) reading of relevant case law.

The goal of this dissertation is to provide a normative defense of the Court's decision-making process during the War on Terror. I will reconstruct and analyze the Court's central arguments and show the ethical importance of its deciding as it did. I will argue that the Court has been justified in challenging certain policies of the elected branches during the War on Terror, specifically, the detention without (fair) trial of foreign nationals suspected of terrorism and detained abroad. And I will defend the Court

8. Joseph Pope, "Opening the Flood Gates: *Rasul v. Bush* and the Federal Court's New World-Wide Habeas Corpus Jurisdiction," *Northern Illinois University Law Review* 26 (2006): 348–350.

against three specific criticisms of its War on Terror jurisprudence: first, that the Court should not get involved in foreign policy—and especially wartime policy making—because it is outside both its expertise and its constitutional mandate; second, that foreign nationals abroad should have no right to challenge their treatment by the U.S. government, such as through the writ of habeas corpus; and third, that the unique nature of the War on Terror means that the judiciary should show extreme deference to the elected branches in how to deal with national security threats that don't implicate the rights of U.S. citizens or domestic residents.[9] In the process, I will also provide an explanation and defense of the Court's decision to stray from its World War II–era doctrines limiting the reach of the writ of habeas corpus and, by extension, of the Court's ability to step in and defend the rights of foreign nationals abroad.

The Court's recent actions raise important normative questions, not only about its substantive findings, but about the role of the judiciary in our system of governance. Should the least democratic branch of government be overriding the decisions of the elected branches on how to treat suspected terrorists captured abroad? Whereas it was previously difficult to see the Court's intervening at all in foreign policy, why might it now be ethically problematic for the Court to *abstain* from deciding important constitutional questions in that area? Should the Court recognize any geographic or

9. These three criticisms are recurrent themes in critiques of the Supreme Court's War on Terror jurisprudence; see, e.g., Bradford A. Berenson, "The Uncertain Legacy of *Rasul v. Bush*," *Tulsa Journal of Comparative and International Law* 12, no. 1 (2004): 39–52; Brian D. Fahy, "Given an Inch, the Detainee Effort to Take a Mile: The Detainee Legislation and the Dangers of the 'Litigation Weapon in Unrestrained Enemy Hands,'" *Pepperdine Law Review* 36, no. 1 (2008): 129–212; Mark D. Hill, "*Boumediene v. Bush*: The Supreme Court's War on Precedent Damages the War on Terror," *Creighton Law Review* 42, No. 3 (2009): 447–486; Pope, "Opening the Flood Gates"; A. Raymond Randolph, "The Guantanamo Mess," *National Review Online*, September 6, 2011, http://www.nationalreview.com/articles/275279/guantanamo-mess-raymond-randolph; David B. Rifkin, Jr., and Lee A. Casey, "Judges Don't Belong on the Battlefield," *Wall Street Journal*, July 17, 2009, http://online.wsj.com/news/articles/SB124779656089055677; and John Yoo, "The Supreme Court Goes to War," *Wall Street Journal*, June 18, 2007, http://online.wsj.com/news/articles/SB121366596327979497.

situational limits on its power to question the legitimacy of executive detention through its use of habeas corpus? In order to answer these questions, I will investigate how the relationship of the judiciary to the other branches of the federal government has changed as a result of the growth of judicial supremacy over the last century. I will look at the normative considerations that have previously kept the Supreme Court from intervening in foreign policy, and recent developments that have brought those considerations into question during the War on Terror. And, I will explore the moral significance of the writ of habeas corpus as a check on executive power, and how the Supreme Court has modified its reach throughout U.S. history to maintain it as an effective tool both of challenging arbitrary imprisonment by the executive branch and of maintaining the constitutional separation of powers.

Nonetheless, though my focus is on the normative aspect of the detainee cases, answering the aforementioned questions will require some consideration of the Court's history, the evolution of its power over the twentieth century, and the changing political dynamics that shape how the Court interacts with the other two branches of the federal government. In other words, given the subject of study, the normative analysis can't be entirely separated from an empirical study of the Court, and explicating the normative issues at play may, in the process, provide a causal explanation for the Court's behavior.

I will argue in this dissertation that the recent detainee cases should be understood not as a radical departure from precedent, but as a moderate and entirely defensible extension of the Supreme Court's power to defend individuals from executive overreaching. Equally as important, the Court has not created a new area of jurisprudence, but merely modified a preexisting—and longstanding—tool at its disposal:

the writ of habeas corpus, the centuries-old method for a prisoner to assert a need for judicial intervention in an arbitrary and unjust imprisonment.

However, this analysis would be incomplete if it stopped with *Boumediene*, the case in which the Court issues its momentous constitutional declaration that the Constitution (or at least one part of it) applies to foreign nationals captured and detained abroad. Although *Boumediene* has had an important and concrete impact on the fate of some detainees at Guantanamo Bay, subsequent developments in the lower federal courts have undermined its greater promise. *Boumediene* stood for the principle that the political branches of the federal government were bound to respect limitations on their power to detain individuals without due process, even if those individuals had no prior legal relationship with the United States. However, for reasons that will be addressed in Chapter VII, *Boumediene* purposefully kept vague how the decision would play out in practice—that is, whether and how the central holding would apply to different situations of military detention across the globe. Since *Boumediene,* rulings by lower courts, especially the Court of Appeals for the District of Columbia Circuit, have heavily restricted its practical effect on detainees abroad. The Supreme Court has largely remained silent about these post-*Boumediene* developments, denying certiorari to several appeals from detainees who lost their cases at the circuit court level. In the Postscript, I address these recent developments and assert that the normative considerations outlined in earlier chapters point to the need for the Supreme Court to intervene again and reassert the importance principles that underlay *Boumediene*.

Below I provide some background on the issues that will be discussed throughout this dissertation. Because of the centrality of the *Boumediene* decision to the Supreme

Court's War on Terror jurisprudence, I start with a summary of that case and its significance.

Boumediene

On June 12, 2008, the Supreme Court delivered "a stinging rebuke of the [Bush] administration's antiterrorism policies"[10] in a decision that "sounded a death-knell to the [administration's claim that] the President can imprison people indefinitely without court review simply by bringing them to a US enclave on an island in the Caribbean."[11] By a 5-4 vote, the Court held that military detainees from the "war on terror" who were being held at the U.S. naval base at Guantanamo Bay, Cuba, had a constitutional right to initiate habeas corpus proceedings in U.S. federal court to challenge their incarceration.

The case was groundbreaking for several reasons. It seemed to implicitly overrule a decades-old holding that noncitizens held outside the United States are categorically excluded from constitutional civil-liberties protections. It represented the culmination of years of the Supreme Court's attempting to avoid making any constitutional determination about the rights of noncitizen detainees abroad, having handled previous cases by rereading relevant federal statutes. Perhaps most importantly, it was the first time in U.S. history[12] that the Supreme Court declared an act of Congress to be a violation of the Suspension Clause of the U.S. Constitution, which states that "[t]he privilege of the writ of habeas corpus shall not be suspended, unless when in cases of

10. Yoo, "The Supreme Court Goes to War."

11. Jonathan Hafetz, "Supreme Court Deals Death Blow to Guantanamo," *The Nation*, June 12, 2008, http://www.thenation.com/doc/20080630/hafetz.

12. Gerald L. Neuman, "The Habeas Corpus Suspension Clause after *Boumediene v. Bush*," *Columbia Law Review* 110 (2010): 538.

rebellion or invasion the public safety may require it."[13] And the Court made such a charged and controversial finding in a case that dealt with an unpopular and politically insignificant group: foreign nationals whom the U.S. government claimed were terrorists.

Until the War on Terror, the Court's wartime jurisprudence was based largely on precedents from World War II, during which time the Court repeatedly absolved itself of any responsibility in the United States' handling of combatants outside the United States. In *In Re Yamashita*[14] and *Hirota v. MacArthur*,[15] the Court claimed it was not its place to question the legality or constitutionality of U.S.-led military tribunals trying foreign combatants abroad, precisely what it did when it struck down Bush's military tribunals for Guantanamo detainees in *Hamdan*. And in *Johnson v. Eisentrager*,[16] the Court drew a bright-line rule about the reach of judicial power to question the foreign detention of noncitizens.

In *Eisentrager*, the Court dismissed the habeas petitions of several Germans who had been tried and convicted by a U.S. military commission in China and imprisoned in a U.S.-run prison in occupied Germany. The petitioners claimed the military commission lacked jurisdiction to try them and thus their subsequent imprisonment was illegal and unconstitutional. The case involved only some of the hundreds of appeals from former Axis soldiers and supporters who challenged their detention and the process (if any) afforded to them to justify the detention.

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13. U.S. Const. art. I, § 9, cl. 2.

14. 327 U.S. 1 (1946).

15. 338 U.S. 197 (1948).

16. 339 U.S. 763 (1950).

Without ruling on the substance of the petitioners' claims, the Supreme Court dismissed the prisoners' petitions, holding that a "nonresident enemy alien… does not have even…qualified access to our courts"[17] to challenge his or her detention by the executive. Responding to the petitioners' claim that they had constitutional rights that the president was violating, Justice Robert Jackson, in the opinion for the court, stated that "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act."[18] Moreover, Jackson suggested, even if the petitioners could point to some rights that they possessed and that were being transgressed, they could not sue in U.S. federal court to enforce them, as "the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection."[19] Because the Guantanamo detainees in the War on Terror had all been captured and imprisoned outside the United States, *Eisentrager* seemed to prohibit their using habeas proceedings to challenge their detention.

The Court had several ways in which it could respond to the Guantanamo detainees' petitions. The most obvious would have been to dismiss them, upholding the 60-year-old *Eisentrager* rule, cited favorably and repeatedly in subsequent opinions, that the Court cannot intervene in cases involving noncitizens outside the United States. The Court chose not to follow that path, but it also failed to overrule *Eisentrager* outright and draw another bright-line rule about how and when noncitizen detainees outside the United

17. *Id.* at 776.

18. *Id.* at 771.

19. *Id.* at 777–778.

States can claim constitutional protections. Instead, the Court decided to portray *Eisentrager* as allowing courts to balance different factors about the situations of individual detainees to determine whether they have a constitutional right to habeas corpus. Unlike in *Eisentrager,* the Court in *Boumediene* seemed undeterred by questions of geography or the extraterritorial applicability of constitutional rights, holding that, once it was established that detainees were in U.S. hands, "the adequacy of the process" afforded them and "the practical obstacles inherent in resolving the prisoner's entitlement to the writ" were the central questions in determining whether the judiciary should intervene.[20]

This reasoning was denounced not only by the dissenters in the case, but by many of the supporters of the Court's holding. "This 5-4 decision was correct [and the] conservatives justices in the minority were wrong," said law professor Richard Epstein, but the majority rested its argument on "fancy intellectual footwork" and a judicial "sleight of hand" in order to avoid overruling conflicting precedent.[21] "*Boumediene* was correctly decided," wrote another commentator, but Justice Kennedy, the author of the opinion for the court, produced an "annoying opinion with too many vagaries," and his method for determining the extraterrorial reach of the Suspension Clause seemed "arbitrary" and "sloppy."[22]

The exact holding and reasoning in *Boumediene* are discussed in detail in Chapter VII, after a consideration of the factors that help make sense of what the Supreme Court

20. *Boumediene*, 553 U.S. at 766.

21. Richard A. Epstein, "How to Complicate Habeas Corpus," *New York Times*, June 21, 2008, http://www.nytimes.com/2008/06/21/opinion/21epstein.html.

22. William Ziegler, "Their Day in Court: *Boumediene* was a Flawed Decision—But Right," *The American Conservative*, July 14, 2008, 17–20.

was hoping to accomplish. It is essential at this point only to understand that the Court was less concerned with being consistent with its precedents and more with making a point. As with much of the Supreme Court's constitutional jurisprudence, the detainee cases are more an exercise in moral philosophy than interpretation of precedent. The Constitution makes no reference as to whether the Suspension Clause or the Bill of Rights applies abroad, and it is left to the justices to reason about both the practical and moral import of how it interprets those provisions in particular cases. The Court also has to consider more broadly its power and authority to intervene in the first place. Again, given the extensive practical power of the modern Court to "say what the law is,"[23] this is an exercise in moral and political theory, requiring the Court to judge how it should position itself vis-à-vis the other two branches, its importance in policing the separation of powers, and the deference that it should show in a democracy to the elected branches.

The War on Terror Cases Prior to *Boumediene*

The *Boumediene* decision represented the culmination of a series of cases in which the Supreme Court attempted to push back against the claims of the executive branch that it had the power to detain anyone at will, without trial, for as long as it chose. As will be discussed in Chapter VI, the Court was hesitant to decide *Boumediene* because that case required it to issue a constitutional holding. Under the doctrine of constitutional avoidance (or the "last resort rule"[24]), the Court refrains (or is supposed to refrain) from

23. Marbury v. Madison, 5 U.S. 137 (1803).

24. See Lisa A. Kloppenberg, "Avoiding Constitutional Questions," *Boston College Law Review* 35, no. 5 (1994): 1003–1066.

issuing decisions interpreting the Constitution when it is capable of relying on nonconstitutional (e.g., statutory) grounds instead.

In two earlier cases involving the rights of foreign nationals detained abroad, the Court was able to do just that. In *Rasul v. Bush*, detainees at Guantanamo Bay argued, as they did in *Boumediene*, that they should have the right to use the writ of habeas corpus to challenge their detention in federal court. The writ of habeas corpus, however, is governed not only by the Suspension Clause of the Constitution, but by a federal statute that lays out the jurisdiction of the federal courts to issue the writ.[25] In *Rasul,* the Supreme Court merely reinterpreted the reach of the statute to encompass the Guantanamo detainees.[26]

The weakness of such a statutory holding, of course, is that it is easily overruled by the passage of a subsequent statute. In response to *Rasul*, Congress added an amendment to a bill supposedly intended to protect detainees—the Detainee Treatment Act of 2005 (DTA),[27] which prohibited the use of certain interrogation techniques on terrorist suspects in U.S. custody—that removed their ability to use the U.S. courts to challenge their detention. The DTA amended the federal habeas statute to remove jurisdiction of the federal courts to hear habeas cases, or "any other action against the United States or its agents relating to any aspect of the detention,"[28] from foreign nationals at Guantanamo Bay. To get around the DTA restrictions on the judiciary's hearing cases from Guantanamo detainees challenging their detention or treatment, the Supreme Court, in

25. 28 U.S.C. § 2241.

26. This is explored in greater detail in Chapter VI.

27. Pub. L. No. 109-148, §§ 1001–1006, 119 Stat. 2739–2744 (2005).

28. *Id.* § 1005(e)(1).

Hamdan v. Rumsfeld,[29] interpreted the DTA as applicable only to new detainee cases, not ones pending at the time the DTA passed. As it had after *Rasul,* the Bush administration turned to Congress to overturn a Supreme Court decision limiting presidential authority over detainees. In the 2006 Military Commissions Act (MCA),[30] Congress not only gave its approval to the military commission system proposed by the Bush administration but further extended the jurisdiction-stripping provision of the DTA, making clear that even pending cases from detainees could not be heard by the court system.

As will be discussed in Chapter VI, this back-and-forth between Congress and the Supreme Court—the Court finding statutory authority to hear appeals from Guantanamo detainees, and Congress responding by amending federal law to take away that authority—created a situation where, by 2008, the Court would either have to dismiss all Guantanamo-related suits or find a nonstatutory—that is, constitutional—grant of authority to hear those cases. In *Boumediene*, it chose the latter route.

Domestic cases

Rasul, Hamdan, and *Boumediene* all involved detainees who were neither U.S. citizens nor present within U.S. borders. The questions raised by these cases involved whether the Constitution afforded any protection to someone who had no preexisting connection to the United States. By contrast, three important cases during the War on Terror raised similar questions about the limits on the government in treating citizens and legal residents. Although this dissertation will focus on the treatment of foreign nationals

29. The case and its significance are discussed at length in Chapter VI.

30. Pub. L. No. 109-366, 120 Stat. 2600, codified as 10 U.S.C. §§ 948-949.

abroad, these two cases provide important insight into the judiciary's thinking as it grappled with the moral implications of its decision making during the War on Terror.

In *Rumsfeld v. Padilla*,[31] the Supreme Court avoided issuing any holding on the merits in a habeas challenge to the executive's authority to detain a domestic citizen under military rule. Instead, the Court found a jurisdictional reason to send the case back to the lower courts, postponing consideration of heated constitutional issues until a later time. In *Hamdi v. Rumsfeld*, decided the same day as both *Rasul* and *Padilla*, the Supreme Court addressed whether a U.S. citizen captured abroad, during fighting against the Taliban, could be held in military captivity for the duration of the War on Terror. Unlike the Guantanamo detainees, Yaser Esam Hamdi could assert constitutional due-process rights under the Fifth Amendment and a right to a speedy and fair trial under the Fourth Amendment.[32] The Court was so divided about how to handle this situation that it could not even produce a majority opinion and splintered into four different groups. Justice Sandra Day O'Connor wrote an opinion for a 4-justice plurality finding that Hamdi's particular situation—being captured while fighting for the enemy on a foreign battlefield—justified his military detention. O'Connor claimed that Congress, in passing the Authorization for Use of Military Force (AUMF) in Afghanistan, had given its approval for the president to capture and detain those fighting against the United States for the duration of the conflict and that all the Constitution demanded was that Hamdi be "given a meaningful opportunity to contest the factual basis for that detention before a

31. 542 U.S. 426 (2004).

32. Notably, unlike the habeas cases by the Guantanamo detainees, Hamdi's petition used the writ as a way to vindicate his constitutional rights, not as an independent source of substantive protections. See Chapter I for a discussion of these different forms of habeas.

neutral decisionmaker."[33] Two other justices, Stephen Breyer and Ruth Bader Ginsburg, disagreed with that interpretation of the AUMF and believed that, constitutional issues aside, the detention was invalid because it had not been authorized by Congress. Breyer's opinion, however, left open the possibility that Hamdi could have been legally detained indefinitely as an enemy combatant if Congress had passed more specific legislation. In a surprising opinion that most strongly challenged the president's right to detain a U.S. citizen without trial, Antonin Scalia, joined by John Paul Stevens, claimed that the Constitution required that Hamdi either be tried for treason or released, and any congressional act authorizing indefinite detention without trial was tantamount to an unconstitutional suspension of the writ of habeas corpus. Finally, Clarence Thomas alone found the detention authorized and permissible even if Hamdi were never given a chance to dispute the charges against him.

A third case, *al-Marri v. Wright*,[34] involved a suspected terrorist who was not a citizen but had entered the country legally under a student visa. Ali Saleh Kahlah al-Marri was arrested by the FBI on suspicion of being an al Qaeda affiliate who helped with the 9/11 (September 11, 2001) bombings. However, while a case was pending against al-Marri in federal court, President Bush signed an order transferring him to military custody, and he was held for four years without trial in a South Carolina naval brig. Like Hamdi, al-Marri was suspected of being affiliated with the enemy, and the Bush administration wished to view him not as a civilian criminal but as an "enemy combatant" subject to military confinement. Al-Marri filed a habeas suit challenging his

33. *Hamdi*, 542 U.S. at 509.

34. 487 F.3d 160 (4th Cir. 2007), *rev'd en banc sub nom.* al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008), *vacated as moot*, al-Marri v. Spagone, 555 U.S. 1220 (2009).

detention by the military. In a strongly worded opinion, a panel for the U.S. Court of Appeals for the Fourth Circuit castigated the executive branch for treating a civilian seized on U.S. soil, far away from a battlefield, as a military detainee. "Like others accused of terrorist activity in this country, from the Oklahoma City bombers to the surviving conspirator of the September 11th attacks, al-Marri can be returned to civilian prosecutors, tried on criminal charges, and, if convicted, punished severely," the panel concluded. "But the Government cannot subject al-Marri to indefinite military detention. For in the United States, the military cannot seize and imprison civilians—let alone imprison them indefinitely."[35]

The en banc Fourth Circuit, however, reversed the panel's decision.[36] The court was so fragmented that it produced seven separate opinions, in addition to a per curiam opinion announcing the court's judgment. As with the Hamdi plurality, the closely divided en banc court found that detention of a citizen under these circumstances was justified by the AUMF, though it also found that al-Marri had not been given an adequate chance to dispute the charges against him. As the dissenters in the case pointed out, however, the holding that al-Marri could be considered a military target vastly expanded the category that the *Hamdi* plurality said could be detained as "enemy combatants." The Supreme Court had found Hamdi to be a military target because he was captured by the army during the invasion of Afghanistan, in the midst of active fighting; by contrast, al-Marri was living in Illinois when he was arrested, and there was no evidence he ever fought against the United States on a battlefield. This question—whether civilians like al-

35. al-Marri v. Wright, 487 F.3d at 164.

36. al-Marri v. Pucciarelli, 534 F.3d 213.

Marri can nonetheless be detained militarily as enemy combatants—is one to which I will return in Chapter III.

The Supreme Court granted certiorari in the case, but while the appeal was pending, the Bush administration, likely afraid of the precedent that a Supreme Court opinion in the case might set, transferred al-Marri back to civilian authorities. The Supreme Court ordered the Fourth Circuit to dismiss the case on the grounds that the changing factual situation rendered the appeal moot, and it vacated the en banc court's judgment.[37]

The Argument to Come

The cases mentioned above provide the backdrop against which to consider the central issues raised by this dissertation. In the next two chapters, I consider the broad normative concerns throughout the War on Terror cases. I look at the idea of individual liberty implicit in the constitutional design and the separation of powers, as well as the importance of the Supreme Court's role in policing the separation of powers. I also explore the balance of power among the three branches and look at how the judiciary's power has increased exponentially over the last century, largely in response to the Warren Court's aggressive use of judicial review to defend civil rights and liberties. However, the growth of such power does not mean that the Court has always exercised it; in Chapter II, I also examine how the Court has purposefully stayed *out* of deciding certain matters as a way to protect its institutional legitimacy. This has become particularly relevant during times of armed conflict abroad, as the Court has fashioned doctrines that allow it to extricate itself from foreign policy matters deemed "political questions."

37.al-Marri v. Spagone, 555 U.S. 1220.

The growth of judicial supremacy is an important factor in why the Court has been able to intervene in foreign policy cases, the focus of Chapter III. I argue in that chapter that the Court has been right to intervene in foreign policy when it has been able to address unjust executive detention, even as it has reason to stay out of other cases implicating foreign policy. In Chapters IV-VI, I consider the particular way in which the Supreme Court has recently increased its role in protecting the rights of those captured during the War on Terror, including those of noncitizens detained abroad: the writ of habeas corpus. I argue that the modifications it has made to the writ are not only explainable, but entirely justifiable, in light of changing historical and political contexts. Chapter IV looks at the evolution of the writ throughout U.S. history, Chapter V focuses on how the writ was used (or not used) during the World War II era, and Chapter VI analyzes how the Supreme Court interpreted the statutory and constitutional guarantees of the writ during the War on Terror. A particular focus is the striking difference in how the Court applied the writ during World War II and the War on Terror.

Although the importance of the writ explains, in part, the Court's holding in *Boumediene*, it cannot explain the decision's confusing reasoning, or its refusal to issue clearer guidelines on the protections and procedures demanded by the Suspension Clause of the U.S. Constitution. To make sense of *Boumediene*, therefore, it is necessary to consider in Chapter VII why the Court might be hesitant to issue a rule about the reach of the Suspension Clause, preferring instead to allow the lower courts to make piecemeal decisions that uphold the principle enshrined by the Suspension Clause—freedom from unjust and arbitrary imprisonment—while avoiding the intractable difficulty of encapsulating that reasoning in a rule. Finally, in the Conclusion and Postscript, I

summarize the overall argument and look at developments since *Boumediene* to make the case that the Supreme Court should intervene to overturn recent lower-court decisions placing limitations on the availability of the writ to Guantanamo detainees.

Chapter I: Liberty and Rights in the Constitution, Then and Now

Two large normative questions permeate the recent decisions affecting the treatment of the Guantanamo detainees. The first, discussed in the next two chapters, is whether the judiciary should be getting involved at all; I will argue that it should. If that's the case, a second question emerges: on what basis can the Supreme Court say that the Guantanamo detainees have rights that the judiciary can vindicate? The Supreme Court has held that the Bill of Rights applies to citizens abroad, and to foreign nationals within the country, but not to foreign nationals outside the geographic boundaries of the United States, even to enclaves that are within U.S. control. In fact, the Court has extended a right to habeas corpus to the Guantanamo detainees without relying on the Bill of Rights at all. Instead, it has looked to the Suspension Clause, in Article I of the Constitution, and claimed that it protects a judicially enforceable right for those unfairly imprisoned by the government to argue for their freedom.

To understand this claim, one must understand the normative ideal of limited government codified in the Constitution. More specifically, I will argue that the Framers understood the original Constitution—before the addition of the Bill of Rights—to protect a general right to personal liberty of U.S. citizens, and that a central aspect of this right was freedom from arbitrary treatment by the government, including arbitrary detention and imprisonment. I will further argue that there is, at least today, no reason not to acknowledge that the normative concerns are the same whether the U.S. government unfairly imprisons a U.S. citizen or a foreign national. Therefore, in this chapter I look at the Framers' understanding of this concept of liberty, and how they viewed the Constitution as protecting individual liberty through carefully structuring the federal

government to divide power among the three branches and to outlaw certain practices that were antithetical to the rule of law. In the next chapter, I will discuss at greater length the idea of separation of powers and how it figures into the justification for judicial nullification of unconstitutional laws in cases such as *Boumediene*.

The Early American Understanding of "Liberty"

Early American political ideology merged several overlapping political traditions into a body of thought that emphasized the importance of limited government. Writings from the revolutionary era suggest that the Founders were particularly indebted for their ideas to the tradition of republicanism that stretches back to ancient Greek and Roman times but experienced a revival during the Renaissance.[1] By the time the republican tradition had reached the American colonists, though, it had become "intertwined in the commonwealthman tradition with a habit of … natural-rights thinking,"[2] which provided a language with which to challenge the legitimacy of certain governmental actions. Unsurprisingly, then, the Founders turned for their ideas not only to republican sources

1. See Mauricio Viroli, *Republicanism,* trans. Anthony Shugaar (New York: Hill and Wang, 2002); Quentin Skinner, "The Republican Ideal of Political Liberty," in *Machiavelli and Republicanism,* ed. Gisela Bock, Quentin Skinner, and Mauricio Viroli (Cambridge, UK: Cambridge University Press, 1990), 293–309; Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, MA: Harvard University Press, 1967); and Eric Nelson, *The Greek Tradition in Republican Thought* (Cambridge, UK: Cambridge University Press, 2004), Chapter 6 ("The Greek Tradition and the American Founding").

2. Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1999), 101. See, e.g., the works of Algernon Sidney and *Cato's Letters*, both of which "dr[ew] alternatively on civic humanist and natural rights arguments, without any sign of strain or awareness of inconsistency." David Wootton, "Introduction," in *Republicanism, Liberty, and Commercial Society, 1649-1776,* ed. David Wootton (Stanford, CA: Stanford University Press, 1994), 18. I will avoid here delving into the historical debate, irrelevant to this discussion, about whether those republican thinkers who also relied upon natural-rights language truly believed in the existence of natural rights as deontological constraints or viewed them, as Pettit claims, merely as rhetorical tools to emphasize the value of nondomination (*Republicanism*, 101).

but also to John Locke, borrowing from him ideas about natural rights and the government as a social contract based on the consent of the governed.[3]

The republican tradition is closely tied to the positive conception of liberty as membership and participation in a self-governing community.[4] However, it also stresses a negative component,[5] viewing liberty as freedom from external domination.[6] To be free means not "having to live at the mercy of another, having to live in a manner that leaves

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3. There is a long debate in the historical literature about the exact foundations of American political thought, and to what extent different American historians have overemphasized either Locke's contributions or that of the republican tradition (and additionally, whether the republican strand owes more to Roman or Greek sources). However, there is ample evidence that "the founding generation never conceived that [the natural-rights and republican traditions] were contrary or, in principle, incompatible elements." Michael Zuckert, *The Natural Rights Republic: Studies in the Foundation of the American Political Tradition* (Notre Dame, IN: University of Notre Dame Press, 1996), 209. To the contrary, both pointed to similar conclusions about the need for limited government, individual liberty, and the rule of law. As noted in the previous footnote, it would also be a mistake to view the republican and natural-rights traditions as entirely separate; although classical republicans (e.g., Machiavelli) do not seem to have a concept of individual prepolitical rights, later republicans, including those writing not long before the American Revolution, did incorporate rhetoric about rights into their arguments. See Bailyn, *Ideological Origins*; Gordon Wood, *The Creation of the American Republic: 1776-1787* (Chapel Hill, NC: University of North Carolina Press, 1969); and Mortimer N.S. Sellers, *American Republicanism: Roman Ideology in the United States Constitution* (New York: New York University Press, 1994).

4. See Michael Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Cambridge, MA: Harvard University Press, 1996), 25ff. Sandel notes that a "strong version" of the republican ideal views "civic virtue and political participation as *intrinsic* to liberty," whereas "[m]ore modest versions … see civic virtue and public service as *instrumental* to liberty; even the liberty to pursue our own ends depends on preserving the freedom of our political community" (26; emphasis in original). For the reasons discussed below, I focus on the "modest" version and its instrumental view of the connection between personal and political liberty.

5. The positive–negative distinction comes from Isaiah Berlin's "Two Concepts of Liberty," where he distinguished between negative freedom, or freedom from external rule ("interference"), and positive freedom, or self-mastery. See "Two Concepts of Liberty," in *Liberty: Incorporating Four Essays on Liberty*, ed. Henry Hardy (New York: Oxford University Press, 2002): 166–217. This "modest" version of republican liberty should be considered a form of negative liberty because it is "freedom from" some type of governmental control, and there is a large gulf between saying that one is not being dominated and that one is self-ruling: "Freedom from domination by others is not equivalent to being one's own master, since in itself it is a condition which people may enjoy in a variety of ways, as much by letting themselves be carried away by passion as by bringing themselves under the rule of reason." Charles Larmore, "A Critique of Philip Pettit's *Republicanism*," *Philosophical Issues* 11, no. 1 (2001): 230; cf. M.M. Goldsmith, "Liberty, Virtue, and the Rule of Law, 1689-1770," in *Republicanism, Liberty, and Commercial Society, 1649–1776,* ed. David Wootton (Stanford, CA: Stanford University Press, 1994): 197–232. Goldsmith argues that neither the "personal" nor "political" conceptions of republican liberty map well onto Berlin's negative–positive dichotomy.

6. Skinner, "Republican Ideal of Political Liberty"; Pettit, *Republicanism*, 51ff.

you vulnerable to some ill that the other is in a position arbitrarily to impose."[7] Note the importance here of the notion of *arbitrary* control, rather than control by any external forces. For the republicans,

> Being unfree does not consist in being restrained; on the contrary, the restraint of a fair system of law—a non-arbitrary regime—does not make you unfree. Being unfree consists rather in being subject to arbitrary sway: being subject to the potentially capricious will or the potentially idiosyncratic judgment of another.[8]

Arbitrary rule—domination—can be understood in two different ways, what Skinner calls "political liberty" and "personal liberty": the former involves living in a free state, or one that is not ruled by another political body, whereas the latter consists in having freedom as an individual, not ruled by another human being or political entity. For the republicans, political liberty is a prerequisite for personal liberty, since as soon as a body politic forfeits the capacity to act according to its general will, and becomes subject to the will of either its own *grandi* or some ambitious neighboring community, its citizens will find themselves treated as means to their masters' ends, and will thereby lose their freedom to pursue their own purposes.[9]

However, though the establishment of a self-ruling state is necessary, it is not, in itself, sufficient to ensure personal liberty. Personal liberty requires not only that the state as a political body be free from external control, but that "each citizen remains free from

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7. Pettit, *Republicanism*, 4–5. See also Skinner, "Republican Ideal," 300–302.

8. Pettit, *Republicanism*, 5. As Montesquieu said, "Liberty is the right to do everything the law permits." Charles de Secondat, baron de Montesquieu, *The Spirit of the Laws*, Cambridge Texts in the History of Political Thought, trans. Anne M. Cohler, Basia Carolyn Miller, and Harold Samuel Stone (New York: Cambridge University Press, 1989), 155.

9. Quentin Skinner, "The Idea of Negative Liberty: Philosophical and Historical Perspectives," in *Philosophy in History: Essays in the Historiography of Philosophy*, ed. Richard Rorty, Jerome B. Schneewind, and Quentin Skinner (New York: Cambridge University Press, 1984), 206.

any element of constraint (especially those which arise from personal dependence and servitude) and in consequence remains free to pursue his own chosen ends."[10]

It is this negative conception of personal liberty that is important for the discussion of the Guantanamo cases. Foreign nationals captured and detained abroad might be viewed as having little to do with the structure of the U.S. government. They certainly cannot experience "liberty" in the participatory sense within the United States, since, by definition, foreign nationals are not members of the U.S.'s political community. However, the republicans' argument about the value of individual liberty assumes that it is a good that all value, a "good in and of itself"[11]: it is not something that only citizens within a particular political community might want, but one that, as Machiavelli said, allows all individuals "to live in security" and "without any anxiety…not being afraid for [themselves]."[12] And insofar as there is an instrumental connection between political and personal liberty, there is reason to view anyone whose personal liberty is challenged to have an interest in enforcing the checks and balances that ensure the proper functioning of the government. That is, even someone outside a country may have an interest in seeing a proper republican government flourish, if that individual's personal liberty is threatened by arbitrary actions by that state.

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10. Skinner, "Republican Ideal of Political Liberty," 302.

11. Eric Nelson, "Republican Visions," in *The Oxford Handbook of Political Theory*, ed. John S. Dryzek, Bonnie Honig, and Anne Phillips (Oxford: Oxford University Press, 2008), 194.

12. Niccolo Machiavelli, *Discourses on Livy,* in *The Chief Works and Others*, trans. Allan Gilbert (Durham, NC: Duke University Press, 1965), 236–237, quoted in Pettit, *Republicanism,* 28.

Rights

When faced with finding a normative basis to argue that the actions of the British government were wrong and therefore justified revolution, the Founders tried to strengthen their claims about the need for governments to respect liberty by turning to the Lockean idea of natural rights. Bernard Bailyn notes how the colonists were able to merge the language of natural rights with the republican view of liberty as nondomination. For the colonists, liberty "was the capacity to exercise 'natural rights' within limits set not by the mere will or desire of men in power but by non-arbitrary law—law enacted by legislatures containing within them the proper balance of forces."[13] This is in keeping with John Locke's understanding of liberty within the social contract, an understanding so close to that of the republicans that Philip Pettit even claims him as a republican thinker.[14] For Locke, joining the social contract represents trading one's natural liberty—the right "to be free from any superior power on earth"—for civil liberty, "the liberty…to be under no other legislative power, but that established, by consent, in the common-wealth."[15] The reason for joining the social contract—for coming together under a government—is that it provides greater security for the protection of one's natural rights to life, liberty, and property.[16] A legitimately constituted government reflects the implicit consent of the people under it to submit to its rule to escape the insecurity that would otherwise exist. Because citizens consent to the government, they

13. Bailyn, *Ideological Origins,* 77.

14. Pettit, *Republicanism,* 101.

15. John Locke, *Second Treatise of Government*, ed. C. B. Macpherson (Indianapolis, IN: Hackett Publishing Company, 1980), §22.

16. Ibid., §§ 123–124.

should also be seen as consenting to the laws that the government institutes to regulate social interactions. But to rule legitimately, the government must govern only by "promulgated established laws" that apply to all equally, reflecting the natural equality of all citizens, and are "designed for no other end ultimately, but the good of the people."[17] A government acts illegitimately when it governs arbitrarily—that is, when it acts however it chooses instead of conforming its behavior to accord with previously established laws, or when it violates the natural equality of its people by treating certain individuals differently than others.[18] A government that rules according to law, though, respects each individual's natural rights to life, liberty, and property.

The important role that the concept of rights can play in restraining government and ensuring respect for individual liberty has led to their enshrinement in legal texts as far back as the Magna Carta. Common law courts in England for centuries have also adhered to the view that an unwritten English constitution, "consist[ing] of a mixture of custom, natural law, religious law, enacted law, and reason,"[19] functions to give English citizens certain common-law rights that constrained how the government could treat them.[20] The importance of enumerating particular rights to serve as a protection of individual liberty was a key argument made by the Anti-Federalists during the debates about ratification of

17. Ibid., § 142. See also §§ 134–141.

18. Ibid., §§ 135–136. It also acts illegitimately when it violates the natural rights of its citizens, which can occur when it abuses its authority by going beyond the minimal set of rules needed to govern. This is stressed (though sometimes without the language of rights) more clearly in the work of later liberals such as John Stuart Mill and Robert Nozick.

19. Suzanna Sherry, "The Founders' Unwritten Constitution," *University of Chicago Law Review* 54, no. 4 (1987): 1129.

20. See Roscoe Pound, *The Spirit of the Common Law* (Francestown, NH: Marshall Jones Company, 1921), Chapter IV ("The Rights of Englishmen and the Rights of Man"). Richard Primus notes that the Founders were heavily influenced by this idea. Primus, *The American Language of Rights* (New York: Cambridge University Press, 2004), 88–91.

the Constitution. The Anti-Federalists argued that the Constitution was defective because it lacked an enumerated list of rights that the government was bound to respect.[21] However, the Federalists responded that a delineation of particular rights was unnecessary because the Constitution structured the government in such a way as to protect individuals' natural rights; in fact, an enumeration of particular rights was dangerous because it risked omitting some or suggesting that certain non-enumerated rights were not as important as the enumerated ones.[22] The background assumption, therefore, was that the original Constitution, despite lacking a Bill of Rights, nonetheless protected certain fundamental individual rights, including the right to liberty—to be free from arbitrary treatment and, especially, arbitrary punishment such as imprisonment, by the government.

The Federalists believed that the pre–Bill of Rights Constitution restricted the government in such a way as to create certain zones of liberty around individuals. Insofar as individuals can call upon some governmental body to enforce these restrictions, they can be seen as having "rights" that derive from the structure of the government established by the Constitution. Thus, the original (pre–Bill of Rights) Constitution creates what have been called "structural rights"[23]—they do not *explicitly* confer the

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21. See, generally, Ralph Ketcham (ed.), *The Anti-Federalist Papers and the Constitutional Convention Debates* (New York: Signet Classics, 1986).

22. Sandel, *Democracy's Discontent*, 33–39; Geoffrey P. Miller, "Rights and Structure in Constitutional Theory," *Social Philosophy and Policy* 8, no. 2 (1991): 196–197.

23. See Stephen I. Vladeck, "The Suspension Clause as a Structural Right," *University of Miami Law Review* 62 (2008): 275–305; Steven G. Gey, "The Procedural Annihilation of Structural Rights," *Hastings Law Journal* 61, no. 1 (2009): 1–63; and Guy-Uriel Charles, "Judging the Law of Politics," *Michigan Law Review* 103 (2005): 1099–1141. Similar ideas are developed in J. Harvey Wilkinson, III, "Our Structural Constitution," *Columbia Law Review* 104, no. 6 (2004): 1687–1709; Gary S. Goodpaster, "The Constitution and Fundamental Rights," *Arizona Law Review* 15 (1973): 479–520; and Jessica Powley Hayden, "The Ties that Bind: The Constitution, Structural Restraints, and Government Action Overseas," *Georgetown Law Journal* 96 (2007): 237–271. See also Akhil Amar, "The Bill of Rights as a Constitution,"

bases for claims by individuals, but, by preventing the government from acting in certain ways that would limit important individual freedoms, they have the same practical effect as the written enumerated right as can be found in the constitutional amendments, assuming individuals can turn to some body (such as the judiciary) to enforce those limits. The structural guarantees of limited government created by the Constitution should be understood as guaranteeing a minimal set of individual rights to everyone dealing with the U.S. government. The Bill of Rights, which was added later to the Constitution, expanded on these guarantees, but, even where the Bill of Rights isn't applicable, the more minimal "structural rights" created by the Constitution ensure a certain respect for individual freedom and prevent arbitrary treatment by the government.

I use the terminology of "rights" here to emphasize that these restrictions can create claims that individuals can call upon the courts to enforce.[24] Usually the Hohfeldian correlation of rights with duties[25] comes from an enumerated (or asserted) right's creating a duty on another party (e.g., the government) to act in a certain way to respect that right. Here, the relationship is reversed: the duty on the government to respect constitutional limitations on its power creates a correlative "right"—that is, a right not to be subjected to power or authority that the government has been denied.[26]

Yale Law Journal 100, no. 5 (March 1991): 1131–1210, for a general discussion of the relationship between constitutional structure and individual rights.

24. For the idea of rights as claims, see Wesley N. Hohfeld, "Fundamental Legal Conceptions as Applied to Judicial Reasoning," *Yale Law Journal* 26 (1917): 717.

25. Hohfeld, "Fundamental Legal Conceptions."

26. Because this is not the usual sense in which the term "right" is used, other authors discuss similar ideas using the language of structural limits or restraints, see, e.g., Wilkinson, "Our Structural Constitution," and Hayden, "The Ties that Bind."

That the Bill of Rights supplements, rather than replaces, the structural rights in the Constitution should be emphasized, because I do not mean to minimize the importance of those rights guaranteed by the Bill of Rights. My argument is not that of legal critics who set up a dichotomy between structure and rights and argue that these factors promote different values, such as "atomistic self-interest" in the case of enumerated rights and "common interests" or "the realization of various common goods" in the case of structure.[27] Rather, it is that the structural guarantees can create individual rights that look like enumerated rights if they are properly interpreted as judicially enforceable guarantees of individual liberty.[28] This is in addition to their function in ensuring "common goods" such as the proper functioning of the government. The Bill of Rights vastly expands the category of judicially enforceable rights in the Constitution, providing more concrete guarantees than are provided elsewhere in the Constitution; it is therefore not surprising that contemporary constitutional doctrine focuses more on the enumerated rights of the Constitution than the non-enumerated ideal of liberty underlying the constitutional structure.[29] In fact, one can look at the Bill of Rights as providing the foundation on which the Court could make non-contestable claims about whether

27. Charles, "Judging the Law of Politics," 1117–1118.

28. Thus, the discussion in the succeeding chapters about how the Court has found standing for individuals to sue to enforce the separation of powers belies the claim that other legal scholars have made that the difference between rights and structure is that "individual rights claims are justiciable and structural claims are nonjusticiable." Charles, "Judging the Law of Politics,"1124. This may hold true in certain areas, such as, historically, when the political question doctrine arose in relation to conflicts between the Executive and Congress (see next chapter), but as a general claim it fails, since the Court's separation of powers jurisprudence emphasizes that individuals can sue to enforce the separation of powers when transgression of those limits places their liberty at stake.

29. Moreover, the enumeration of rights solved a key shortcoming of the republican ideal of liberty: that there is little ground to argue with actions that are done in accordance with law, even if those actions are oppressive. Because the republican ideal defines individual liberty as freedom from *arbitrary* treatment, and the law is government by established rules, the republican conception equates personal liberty with being ruled by general law.

particular rights are enshrined in the Constitution, allowing it to point to written text rather than engage in theoretical reasoning about the nature and moral framework of the constitutional structure. Nonetheless, the structural provisions can still provide a guarantee of liberty if, for some reason, the Court finds that the Bill of Rights is inapplicable to certain individuals.[30]

The rights flowing from the constitutional structure provide the *mechanisms* through which the judiciary can enforce limitations that respect individual liberty. In other words, there is no explicit guarantee of freedom from arbitrary treatment in the Constitution; however, the Constitution provides for structural rights that end up ensuring individual liberty—that is, freedom from arbitrary treatment—if enforced properly. For instance, the existence of habeas corpus guaranteed by the Suspension Clause is not meant to suggest a "natural right" to a writ of habeas corpus, which would not make sense since habeas only operates within a political structure, with a court capable of issuing such a writ. Rather, it is to point out that the Constitution guarantees a right to a mechanism that has historically been instrumentally invaluable in enforcing the limits on government power that ensure the more fundamental right to liberty. Similarly, the separation of powers is valuable because of how it ensures individual liberty by preventing any one branch from concentrating power. The separation-of-powers doctrine complements the writ of habeas corpus because, as will be seen in later chapters, one way that a habeas challenge to executive detention can succeed is by showing that the executive branch, far from executing the laws as written by Congress, is violating statutory prescriptions, making its actions *ultra vires*.

30. This of course raises the question of why only the pre–Bill of Rights Constitution might be applicable in certain cases when the amendments are not. This will be addressed at length in later chapters.

The Constitution attempts to prevent arbitrary rule, and thus a respect for all individuals' "natural right" to liberty, in two interrelated ways. First, it divides power among the three branches; judicial enforcement of this division, and nullification of laws and policies that violate the separation of powers, ensures that the different branches will monitor and check each other. Second, it declares that certain actions—ones historically associated with tyrannical rule—are outside the government's power. In particular, the Constitution prohibits Congress from passing *ex post facto* laws, which would deny individuals the ability to shape their behavior in conformity to established law; from issuing bills of attainder, which violate the natural equality of citizens by targeting particular individuals with rules that only apply to those individuals; and from suspending (except under the most dire of circumstances) the writ of habeas corpus, the mechanism through which individuals can challenge arbitrary actions by the government that violate their freedoms. The constitutional guarantee of the availability of the writ of habeas corpus in the Constitution's Suspension Clause—"The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it"[31]—was seen as particularly essential because of habeas's role in Anglo-American history as a tool through which individuals could challenge one of the most blatant and problematic manifestations of arbitrary rule: arbitrary imprisonment. Thus, the history and purpose of the Suspension Clause is an important factor to consider in understanding the nature of how the pre–Bill of Rights Constitution nonetheless can provide a robust protection of individual liberty.

31. U.S. Const. art. I, § 9, cl. 2.

Habeas Corpus as a Structural Protection of Liberty

William Blackstone referred to habeas corpus[32] as "the great and efficacious writ, in all manner of illegal confinement."[33] Habeas originated in medieval times merely "as a procedural device to facilitate routine… litigation,"[34] a way "of getting a party before the court so that a case in which he was involved could be adjudicated."[35] The writ directed an official, such as a sheriff, to "have the body" of a suspected criminal or litigant before the court at a certain time so that judicial proceedings could take place. Over the course of several centuries, however, the writ evolved into a tool for courts to evaluate the legality of imprisonment; courts assumed the power, when prisoners were brought before them, to inquire not only into "the cause of detention … [but also] into the lawfulness of that cause."[36] Habeas also developed into a tool for vindicating the due-process guarantee of the Magna Carta.[37] This was a step beyond an evaluation of the legal basis of

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32. For detailed historical accounts of the origins of habeas corpus in common law and its incorporation into the American legal system, see Zechariah Chafee, Jr., "The Most Important Human Right in the Constitution," *Boston University Law Review* 32, no. 2 (1952): 143–161; and William F. Duker, *A Constitutional History of Habeas Corpus* (Westport, CT: Greenwood Press, 1980).

33. William Blackstone, *Commentaries on the Laws of England* (Philadelphia: J.B. Lippincott Co., 1893), Book III, Ch. 8. http://oll.libertyfund.org/titles/blackstone-commentaries-on-the-laws-of-england-in-four-books-2-vols. This quote refers specifically to the *ad subjiciendum* form of the writ (see footnote 36 in this chapter).

34. Daniel John Meador, *Habeas Corpus and Magna Carta: Dualism of Power and Liberty* (Charlottesville, VA: University Press of Virginia, 1966), 4.

35. *Id.* at 8.

36. *Id.* at 9. The original writ of *habeas corpus* evolved into several distinct forms of habeas, all requiring that a prisoner be brought before the court, but for different types of legal proceedings. Throughout this paper, I use the term habeas to refer to the writ of *habeas corpus ad subjiciendum*, the version of habeas used to challenge criminal imprisonment and executive detention. See Blackstone, *Commentaries,* Book III, Chapter 8; Duker, *Constitutional History of Habeas Corpus,* 12–63; Meador, *Habeas Corpus and Magna Carta*, 3–13.

37. "No freeman is to be taken or imprisoned … save by lawful judgement of his peers or by the law of the land." Nicholas Vincent (trans.), Magna Carta, para. 29. http://www.archives.gov/exhibits/featured_documents/magna_carta/translation.html.

detention, for until the seventeenth century the king's command was seen as sufficient legal authorization for holding someone in custody.[38] The passage of the Petition of Right in 1628 and the Habeas Corpus Act of 1679 formally established that English subjects could not be jailed at the whim of the king and that habeas corpus was a swift remedy for such arbitrary imprisonments.

The British colonists settling in North American brought with them the idea of habeas as a common-law right, and William Duker has documented that "the common-law writ of habeas corpus was in operation in all thirteen of the British colonies that rebelled in 1776."[39] At the Constitutional Convention in 1787 and during the postconvention ratification process, habeas corpus assumed a prominent role in debates over whether the Constitution delegated too much power to the new federal government. As noted above, the Federalists argued that a Bill of Rights was unnecessary because the constitutional prohibitions on bills of attainder and ex post facto laws would prevent Congress from arbitrarily imprisoning people—much as the Petition of Right had curbed the British king's power to use royal fiat as a "legal" basis for detention—and the Suspension Clause would protect the availability of habeas corpus, which could remedy all instances of illegal or extralegal detention. In tandem, these three provisions would constitute a *de facto* guarantee of due process and would ensure that the judiciary could remedy all major abuses of power by the political branches:

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38. See Darnel's Case, 3 How.St.Tr. 1 (K.B. 1627).

39. Duker, *Constitutional History of Habeas Corpus,* 115. Some of the states included guarantees of habeas in their constitutions, but as Chafee points out, "Failure to mention habeas corpus in a state constitution does not mean that it was thought unimportant. It had been so long and solidly established in every colony that assertion was probably considered unnecessary." Chafee, "Most Important Right in the Constitution," 146.

> The creation of crimes after the commission of the fact, or, in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law, and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny. The observations of the judicious Blackstone, in reference to the latter, are well worthy of recital: "To bereave a man of life," says he, "or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government." And as a remedy for this fatal evil he is everywhere peculiarly emphatical in his encomiums on the habeas-corpus act, which in one place he calls "the bulwark of the British Constitution."[40]

The Antifederalists eventually convinced the First Congress that it would nonetheless be prudent to add in the specific guarantees of the Bill of Rights. However, this did not lessen the importance of habeas, or the Suspension Clause, to the legal system of the new republic: none of the amendments indicated a judicial enforcement mechanism, and habeas would soon become a key way for individuals to vindicate many of these rights, much as habeas in England had evolved into a method for British subjects to enforce their right to due process under the Magna Carta. Moreover, the constitutional guarantee of habeas in the Suspension Clause still protects a powerful guarantee of liberty, even for individuals who may not possess the rights enumerated in the Bill of Rights. As the situation of the Guantanamo detainees has highlighted, if the Suspension Clause is viewed as having a broader extraterritorial reach than the Bill of Rights, then

40. Alexander Hamilton, *Federalist 84* (quoting Blackstone, *Commentaries*, Bk. I, Ch.1 and Bk. IV, Ch. 33), in Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers and Letters of "Brutus,"* Cambridge Texts in the History of Political Thought, ed. Terence Ball (New York: Cambridge University Press, 2003), 416–426; emphasis removed. See also Vladeck, "Suspension Clause as a Structural Right," 282ff.

the Clause might protect a right to habeas for noncitizens detained abroad even if they lack Fifth Amendment due-process rights.[41]

This relies, however, on recognizing the two different ways in which habeas can function. On the one hand, the writ can be a way to vindicate other, enumerated constitutional rights, such as due process, just as it was previously a means for British subjects to enforce the Magna Carta's guarantees of rights and liberties. Understood in that sense, habeas is merely a procedural tool—it brings the jailer and jailed into the courtroom. However, the original understanding of habeas was as a *substantive* guarantee of liberty, even in the absence of enumerated rights. This conceptualization of habeas has been outlined by legal scholar Jared Goldstein, who argues,

> Rather than protecting discrete individual rights, such as the right to a jury trial, the right to counsel, or the right to confrontation, the writ of habeas corpus [originally] developed as a means of ensuring that detention could only be imposed based on lawful authority. Habeas cases focused on the jailer's power. To the extent that habeas was characterized as protecting prisoners' rights, it was not understood to protect discrete individual rights but rather to protect a general "right to liberty," which was violated whenever imprisonment was imposed without a lawful basis. Habeas thus was established as a mechanism to protect the rule of law, a broader concept than individual rights.[42]

Goldstein points out that, in fact, "habeas predates rights," at least "in the modern sense of a discrete group of personal trumps against governmental action."[43] The association with rights only came later, once it became clear that this longstanding mechanism for getting parties into court would serve as an effective enforcement mechanism for other such guarantees of rights and liberties.

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41. As noted in footnote 30 in this chapter, the question of *why* the Suspension Clause might be viewed as having a greater territorial reach will be addressed at length in later chapters.

42. Jared A. Goldstein, "Habeas Without Rights," *Wisconsin Law Review* 2007 (2007): 1182.

43. Ibid., 1169.

This distinction between habeas as a vindicator of "individual rights," such as those in the Bill of Rights, and habeas as a separate structural right,[44] which indirectly protects individual liberty by restraining the federal government, has often been muddled by both the Supreme Court and lower courts, as will be discussed at length in later chapters. The courts have often focused primarily on whether those invoking the writ of habeas corpus have some sort of constitutionally or statutorily enumerated right that can be vindicated through habeas. In using habeas in this way, the courts need to look at both whether the individuals involved have any separate rights that can be vindicated and whether the courts have jurisdiction to consider a habeas suit in defense of those rights. By contrast, in the structural-right model, the court only needs to consider whether it has jurisdiction to hear the case. If so, the court can go about examining whether the detention is lawful. In this situation, existence of jurisdiction to hear a habeas suit is, by itself, sufficient to guarantee liberty, as Goldstein notes, because it guarantees that detention follows the law—that it is not arbitrary. Specifically, any detention must not only accord with established law but be *pursuant to* law as well: that is, it can neither be illegal (i.e., contrary to law) nor extralegal (i.e., outside the conditions enumerated in the law).

The substantive guarantees of freedom in the Bill of Rights go far beyond guaranteeing treatment in accordance with law. They provide a mechanism for the

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44. Vladeck, "Suspension Clause as a Structural Right," 275ff. Vladeck goes on to argue that this distinction is mistaken, at least insofar as the Clause is seen as *creating* some kind of right: "the Suspension Clause did not create a 'structural right'; it provided structural constitutional underpinnings for the common-law right that already existed, and specified the only instances in which that right could be abridged" (277). But this is a distinction without a difference: if the Clause is there to provide an explicit written guarantee about the availability of habeas corpus, it has effectively transformed a common-law right into a constitutional one, much as other constitutional guarantees codify preexisting common-law rights. For instance, the common-law "privilege" against self-incrimination was codified as an explicit right in the Fifth Amendment (see John H. Langbein, "The Historical Origins of the Privilege against Self-Incrimination at Common Law," *Michigan Law Review* 92 (1994): 1047–1085), yet no one argues that the Fifth Amendment does not "create" a constitutional right against self-incrimination.

judiciary to challenge laws as unconstitutional not because of how they were legislated, but because they operate to oppress a minority or violate certain fundamental individual rights. In the case of the Guantanamo detainees, however, the vindication of such individual rights was not necessary. A more modest approach was to recognize only that the political branches were exceeding their powers in how they were treating the detainees. Simply by enforcing the Suspension Clause and the separation of powers—that is, by enforcing constitutional limits on the government—the Supreme Court could ensure the detainees were not arbitrarily detained, but only imprisoned for actual crimes.

Rights and Liberty Today

The connection between citizenship and rights at the time of the Founding, and the close connection between republican liberty and participation in government discussed above, might suggest that there is no normative reason to believe that the structural guarantees of liberty in the Constitution protect the liberty of noncitizens. This would be mistaken, however. As noted earlier, the republican concern with freedom from domination is universal, stemming from the natural human desire for security and self-control.[45] Although noncitizens cannot participate to the same degree in the functioning of the republic whose existence preserves individual liberty, they can enjoy the same protection from arbitrary rule if the government is kept to its limited powers in its treatment of noncitizens.

45. See Nelson, "Republican Visions," 193ff, for a discussion of the genesis of this view in Roman political thought, especially that of Cicero. Pettit provides an extended discussion of the universal value of individual liberty (understood as non-domination) in *Republicanism*, Chapter III ("Non-domination as a Political Ideal").

The case becomes even stronger when considering the ideas about natural rights underlying the Constitution. Among the defects of natural rights theories such as Locke's was how easy it was to exclude certain groups of people, such as women and minorities, from coverage.[46] This is why, for instance, the "self-evident" truth that "all men are created equal"[47] could coexist with the existence of the institution of chattel slavery. However, the concept of prepolitical rights still serves a powerful function: to provide a normative ground on which to argue that some actions of government are categorically wrong, regardless of whether they reflect popular will or legitimate process. In the modern world, this has led to the development of the idea of universal human rights, which escape from the exclusionary nature of natural rights by claiming that human rights inhere in all people simply in light of their being human beings. Although critics argue that the idea of human rights suffers from many of the same defects as that of natural rights, including no clear consensus on the ontological basis of such rights,[48] there is no doubt that it has an instrumental value as a challenge to governmental tyranny and as a protector for individual liberty. This is why, as Richard Primus has documented, the modern notion of human rights rose out of a particular historical context: the atrocities committed by Nazi Germany during World War II.

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46. See Richard Primus's interesting discussion of how philosophers of natural rights limited the scope of their theories in *The American Language of Rights*, 191ff.

47. The Declaration of Independence (U.S. 1776).

48. Various justifications have been brought forward for why we should believe in prepolitical human rights, including those based on Kantian ideas about human dignity and others based on Judeo-Christian religious ideology. The latter is clearly insufficient for those who do not share this religious orientation, and the former fails if one accepts the various criticisms that have been put forward of the foundational assumptions of Kantian moral philosophy. As Primus notes, to get around this, many theories of human rights don't even provide a justification: "the assertion that human beings have rights in virtue of their humanity often comes with no supporting argument, as if it were entirely self-evident." Primus, *American Language of Rights,* 194.

> Needing to articulate a basis on which Nazism could be condemned as morally wrong, Americans revived the concept of enforceable rights prior to the written law. There is a binding law superior to any written law, this line of thinking went, and it confers upon all human beings in virtue of their humanity certain rights which must be protected. This was an implicit message of [the war crimes tribunal at] Nuremberg…. Furthermore, the rise of universal or human rights was more than formal. It was linked to certain substantive ideas about the content of rights, many of which were themselves informed by aspects of the confrontation with European totalitarianism.[49]

With the rise of such theories of human rights has come the development of international humanitarian laws designed to protect all individuals during wartime, as discussed in the next chapter. Some of these laws, the Supreme Court has held, are as binding as domestic law, having been implemented through congressional ratification.[50] But even where international humanitarian and human-rights laws are not legally binding, they stand for the proposition that the United States is part of a global community, whose norms—including respect for individual liberty—should be reflected in U.S. law. In recent years, the Supreme Court has shown a recognition that international human-rights norms should influence—or at least comport with—how it interprets constitutional clauses that protect individual rights and liberties. In 2005, for instance, when the Court considered whether the Eighth Amendment prohibition of cruel and unusual punishment barred the imposition of the death penalty on minors, it noted that though international law was not "controlling," it was nonetheless "instructive."[51] Among the sources to

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49. Primus, *American Language of Rights*, 224.

50. The Supremacy Clause states, "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and *all treaties made, or which shall be made, under the authority of the United States,* shall be the supreme law of the land." U.S. Const. art. VI, para. 2 (emphasis added). However, the Supreme Court has drawn a distinction between treaties that are "self-executing" and those that require further congressional action to be implemented. Only those treaties that are self-executing or that have been implemented through additional legislation are considered binding (i.e., judicially enforceable) as domestic law. See Medellín v. Texas, 552 U.S. 491, 504–532 (2008).

51. Roper v. Simmons, 543 U.S. 551, 575 (2005).

which the Court turned were the U.N. Convention on the Rights of the Child (a document that, unlike the Geneva Conventions considered in *Hamdan*, the United States hasn't even ratified) and the International Covenant on Civil and Political Rights.[52] Likewise, in its 2003 decision striking down criminal prohibitions of consensual sodomy, the Court discussed the inconsistency of its jurisprudence on gay rights with recent decisions in Europe, referencing the "values we share with a wider civilization" and taking guidance from what is "accepted as an integral part of human freedom in many other countries."[53]

This argument might seem to suggest that I am advocating that the Supreme Court should be taking it upon itself to consider enforcing moral or human rights separate from constitutional guarantees—in other words, that because the Constitution presupposes certain natural rights, and the international community has begun the process of establishing the notion of human rights in international law, the Courts should feel free to enforce those regardless of what the constitutional text says. However, my argument can be made without raising the complicated normative concerns such a proposal would raise, due to the connection between individual rights and liberty on the one hand, and constitutional structure on the other. The courts need not rely directly on the concept of non-enumerated rights if all they are doing is enforcing the separation of powers and the constitutional limitations on the political branches that ensure the availability of remedies to arbitrary detention. Structural rights flow from these guarantees, insofar as they protect individuals from certain governmental actions. The pre–Bill of Rights Constitution thus protects certain rights as long as the courts hold the political branches to the limited

52. *Id.* at 575–578.

53. Lawrence v. Texas, 539 U.S. 558, 573, 576 (2003).

powers enumerated in the Constitution. This will not be sufficient to remedy every (or even most) instances of human-rights violations, but it will be sufficient to ensure some basic protection against arbitrary treatment, including imprisonment.

The fundamental question that still remains is that of scope. Even if all the courts are doing is enforcing basic values and language in the constitutional text itself, there is still the question of whether those protections apply to noncitizens, especially noncitizens overseas. This is where the ideology of moral rights and the republican understanding of the value and importance of individual liberty come into play. There are vast differences between the constitutional rights and privileges of citizens and noncitizens, but our contemporary cosmopolitan understanding of human rights suggests that, at minimum, a government cannot be viewed as acting legitimately if it transgresses the most fundamental of individual rights—to be free from the arbitrary deprivation of one's life and liberty. To put the recognition of these moral values into practice, however, does not require any judicial recognition of extraconstitutional rights: only an understanding of the connection between constitutional limits and individual liberty, and a willingness to view constitutional limitations on the federal government as applicable even when the government acts outside of our geographic territory, or when its policies only impact foreign nationals abroad.

Chapter II: What the Court Does and Doesn't Do: Some Thoughts on Judicial Review and Judicial Abstention

The Supreme Court's intervention in the Guantanamo cases surprised some court watchers in how far the Court was willing to push back against the political branches, even declaring congressional limitations on its habeas jurisdiction at Guantanamo to be unconstitutional. In stark contrast to how it behaved during and right after World War II, the Court was willing to say that the judiciary had an important role to play in monitoring the treatment of noncitizen detainees overseas—exactly the group for which the *Eisentrager* Court had disclaimed any responsibility. At the same time, the Court pursued this in an incremental fashion: it was seven years between the start of the War on Terror and the Court's declaration that the Guantanamo detainees have a constitutional right to habeas hearings, and in decisions prior to *Boumediene*, it carefully avoided making any constitutional holdings.

This chapter looks at several general concerns that arise whenever the Court decides to intervene to assert the power to review federal laws and policies and determine their constitutionality. I first consider the issue of judicial review in general, and argue that it plays an important role in the U.S. political system in explicating certain values underlying the Constitution. My goal here is not to provide a comprehensive normative justification for the practice, which would be outside the scope of this chapter; rather, it is to show that the practice in general can be defended as legitimate despite its apparent

contradiction with democratic rule[1] (and I will leave it to others to provide a comprehensive defense of the practice).

I then move on to discuss two countervailing forces that are present in the Supreme Court's use of judicial review. On the one hand, the aggressive use of judicial review ever since the Warren Court–era has led to the point where the Court's institutional ability to issue decisions that the other branches will view as binding has caught up to its longstanding rhetoric that it has the power to "say what the law is."[2] On the other hand, the Court is still cognizant that this institutional competence is a recent development and rests on a shaky foundation: the acquiescence of the other branches. Concern about maintaining its standing and legitimacy in the eyes of the other branches, and in the eyes of the public, can sometimes temper the rush to hold congressional acts unconstitutional, especially in an area such as foreign policy where the Court admits that it has less institutional capacity than the elected branches to make informed decisions. It should therefore come as no surprise that the Court's holdings often track public opinion[3] and that the Court often uses its discretionary power over its own docket to hold off on hearing cases when public opinion has not yet caught up with its constitutional views. It is also not surprising that the Court has developed a doctrine that encourages it to avoid making constitutionally based decisions when statutory grounds are sufficient, giving itself the cover of saying that the real policymakers are the legislators who wrote the law.

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1. Throughout this chapter, I use the term "democratic" interchangeably with "republican," republicanism representing one form of democratic (i.e., popular) rule. See David Held, *Models of Democracy*, 3rd ed. (Stanford, CA: Stanford University Press, 2006), especially 29–55.

2. *Marbury,* 5 U.S. at 177.

3. See Kevin T. McGuire and James A. Stimson, "The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences," *Journal of Politics* 66, no. 4 (2004): 1018–1035.

The Court's foray into the Guantanamo cases thus well reflects the analysis of Alexander Bickel, who thought that, though the Supreme Court should intervene when necessary to vindicate fundamental constitutional values, it should also be aware of the fragility of its institutional position, choose its battles carefully, and avoid deciding more than is necessary to settle a particular case.

Doubts about the Legitimacy of Judicial Review

The central normative question in any analysis of judicial review[4] is whether the judiciary should have this power at all. Should the only unelected branch be intruding on the elected branches to prevent the democratic will from being enacted? This question implicates what Alexander Bickel called the "counter-majoritarian difficulty"[5]: that granting the power of judicial review to a small number of unelected judges appears to run counter to the basic premise of democratic rule that policy and law will reflect the majority's will. In addition, as Paul Brest et al. note, "No provision of the Constitution explicitly authorizes the federal judiciary to review the constitutionality of acts of

4. I use the term "judicial review" to refer the judiciary's practice of declaring laws and policies unconstitutional and its power to do so. Some commentators draw a distinction between two different aspects of this practice, using "judicial review" to refer to the "authority of a court, when deciding [particular] cases, to refuse to give force to an act of a coordinate branch of government" if it views that act as unconstitutional, and "judicial supremacy" to refer to the practice by which the judiciary can make constitutional interpretations that are binding on other branches, nullifying laws and policies in their entirety and with the expectation that the other branches will acquiesce. Walter F. Murphy, "Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter," *Review of Politics* 48, no. 3 (1986): 406–407. See also Keith Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (Princeton, NJ: Princeton University Press, 2009), 5–31. The defense of judicial review I provide below encompasses both aspects of judicial nullification of legislation, though I discuss below the idea of "coordinate review" that accepts only the first definition of judicial review and rejects judicial supremacy.

5. Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd ed. (New Haven, CT: Yale University Press, 1986), 16ff.

Congress."[6] Thus this authority cannot be justified by simply pointing to its inclusion among the specific powers granted to the judiciary in Article III; instead, it requires a justification that shows that it plays an important role in ensuring constitutional governance while demonstrating that it does not run contrary to the basic premises of democratic rule.

Some of the Framers expected the federal courts to have the power of judicial review precisely because of its importance in ensuring the functioning of the constitutional order, believing that "[the courts'] exposition of the laws" necessarily "involve[s] a power of deciding on their Constitutionality."[7] Hamilton, for instance, saw it as an essential part of enforcing the separation of powers, for in his view, constitutional limits on the legislature "can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."[8] Alexander Hamilton did not see judicial review as countermajoritarian, believing that, ultimately, the judiciary was upholding values reflective of the popular will.[9] That is, since judges are simply upholding constitutional values, "judges do not check the people, the Constitution does, which means the people are ultimately checking

6. Paul Brest et al., *Processes of Constitutional Decisionmaking*, 5th ed (New York: Aspen Publishers, 2006), 124.

7. Statement of Mr. Gerry, in James Madison, *Notes on the Debates in the Federal Convention*, June 4, 1787, http://avalon.law.yale.edu/subject_menus/debcont.asp. See also Hamilton, *Federalist 78*, in Hamilton et al., *The Federalist Papers and Letters of "Brutus,"* 377–383.

8. Hamilton, *Federalist 78,* in Hamilton et al., *The Federalist Papers and Letters of "Brutus,"* 377–383.

9. Ibid. See also Bickel, *Least Dangerous Branch*, 16.

themselves."[10] Other Framers, however, viewed the power to nullify statutes as a usurpation of congressional authority; at the same time that Hamilton defended the practice, his fellow Federalist, James Madison, expressed concern that it would undermine the coordinate nature of the government, making "the Judiciary… paramount in fact to the Legislature, which was never intended and can never be proper."[11] Moreover, when some state courts asserted the right to judicial review under state constitutions, their actions were met with "criticism … [and] threats of discipline and impeachment."[12]

Although the historical record offers no definitive answer about whether the Framers collectively intended the federal judiciary to have the power of judicial review—and, to some extent, the premises of this question are mistaken, since the Framers don't appear to have held a single view—there are clear normative justifications for this practice when considering what it accomplishes in our political system.[13] For the Constitution to function as an effective limitation on governmental power and a protector of individual liberty, some entity in the government needs to be empowered to explicate its meaning and consider whether legislation and policies are reconcilable with the values it espouses.[14] At least some of the Framers seem to have subscribed to the view—

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10. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980), 8.

11. James Madison, *Observations on the "Draught of a Constitution for Virginia,"* in *The Writings of James Madison*, ed. Gaillard Hunt, vol. 5, *1787-1790* (New York: G.P. Putnam's Sons, 1904), 294.

12. Brest et al., *Principles of Constitutional Decisionmaking,* 125.

13. This "functionalist" perspective is elaborated upon and defended by Michael J. Perry in *The Constitution, the Courts, and Human Rights* (New Haven, CT: Yale University Press, 1982), especially 1–36. I rely here heavily on Perry's exposition of this idea.

14. I return to the question of "fundamental values" below, pages 49 –55.

sometimes labeled "departmentalism" or "coordinate review"[15]—that, since no branch of the federal government is supposed to be superior to any other, it was up to each branch to make constitutional determinations for itself; though the judiciary could decide not to follow a statute it viewed as unconstitutional, the executive or legislative branch could ignore this judgment in other contexts if it held its own reasonable yet conflicting perspective on the constitutionality of a federal law or policy.[16] The ability of a branch to check itself, however, presents a clear conflict of interest, and no government entity is likely to acknowledge that it is exceeding its constitutional mandate. "It may be a reflection on human nature," wrote Madison, that people attempt to maximize their own authority, and "such devices [as the separation of powers] should be necessary to control the abuses of government."[17] Madison continues,

> If angels were to govern men, neither external nor internal controls on government would be necessary… In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.[18]

Moreover, granting each branch separate authority to determine constitutionality presents the potential for conflicting interpretations that prevent a clear exposition of what the Constitution requires.

> [A]n important - perhaps the important - function of law is its ability to settle authoritatively what is to be done. That function is performed by all law; but because the Constitution governs all other law, it is especially important for the matters it

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15. Robert Lowry Clinton, *Marbury v. Madison and Judicial Review* (Lawrence, KS: University Press of Kansas, 1989), 22ff; Whittington, *Political Foundations of Judicial Supremacy,* 28ff.

16. In other words, there could be judicial review, but without judicial supremacy; see footnote 4 in this chapter.

17. James Madison, *Federalist 51*, in Hamilton et al., *The Federalist Papers and Letters of "Brutus,"* 251–255.

18. Ibid.

> covers to be settled. To the extent that the law is interpreted differently by different interpreters, an overwhelming probability for many socially important issues, it has failed to perform the settlement function.[19]

There is thus a compelling reason to have a separate, neutral (so far as possible) third party not only check the presidency and legislature, but have the authority to make definitive determination of what the Constitution—the "supreme law of the land"[20]—requires. Of the three branches, the judiciary has the "greatest institutional capacity to enforce legal norms of the Constitution in a disinterested way,"[21] since it plays only a subsidiary role in policymaking. Moreover, the appointment of its members for life tenure, not subject to popular election, allows for greater insulation from public opinion than the members of the other two branches.

Bickel's claim that the practice of judicial review is, in a fundamental way, contrary to the majoritarian democratic ideal sparked a movement of constitutional scholars to attempt to justify it on grounds ranging from its role in protecting the democratic process to upholding the Constitution as superior to statutory law.[22] The notion underlying this disagreement was that the practice needed some justification because it was antidemocratic: it involved the use of a small group of unelected individuals to overturn the will of the "people."[23]

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19. Larry Alexander and Frederick Schauer, "On Extrajudicial Constitutional Interpretation," *Harvard Law Review* 110, no. 7 (1997): 1377.

20. U.S. Const. art. VI, cl. 2.

21. Perry, *Constitution, Courts, and Human Rights,* 15–16.

22. See, e.g., Choper, *Judicial Review and the National Political Process* (Chicago: University of Chicago Press, 1980); Ely, *Democracy and Distrust*; Bruce Ackerman, "The Storrs Lectures: Discovering the Constitution," *Yale Law Journal* 93, no. 6 (1984): 1013–1072; Bickel, *Least Dangerous Branch*.

23. However, some scholars have argued, as I do below, that the notion of a countermajoritarian difficulty reflects a misunderstanding of the American republican ideal. Rebecca L. Brown has put forward one of the most persuasive arguments in this regard, claiming that our constitutional history indicates less

As Ronald Dworkin has noted, however, that claim presupposes equating democratic (or more precisely, republican) rule with pure majoritarianism.[24] However, the limitations set by the Constitution on the government stand for the proposition that certain areas are off limits to state power, even when laws governing those areas are passed through proper democratic legislative channels. There may be a conflict between judicial review and majoritarianism, but majoritarianism does not capture the essence of American democracy, which relies also on the notion that the majority cannot legislate however it chooses.[25] Having a nonelected branch intervene to uphold fundamental values and individual rights serves as a counterweight to the majoritarianism of the elected branches to ensure, not that the majority will is thwarted, but that the majority keeps to legislating in accordance with the limitations established by the Constitution.

John Hart Ely and the Critique of Fundamental Values

In one of the most influential studies of judicial review since Bickel's *The Least Dangerous Branch*, John Hart Ely presented a variation of the counter-majoritarian critique. Setting aside the question of whether judicial review based on vindication of

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of a concern with majoritarianism than with protection of individual liberty *from* the majoritarian government. Brown thus "asks the reader to turn Bickel's difficulty on its head and wonder instead how one might justify a system of majority rule in a government whose final cause is the protection of individual rights." Brown, "Accountability, Liberty, and the Constitution," *Columbia Law Review* 98, no. 3 (1998): 535 (emphasis removed); see also her "Separated Power and Ordered Liberty," *University of Pennsylvania Law Review* 139, no. 6 (1991): 1514, arguing that "the protection of individual rights," not majoritarian rule, was the primary concern of the Framers. Ronald Dworkin makes a distinct yet related argument about the concord of judicial review with democratic rule, discussed above.

24. Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, MA: Harvard University Press, 1997), 1–38.

25. See Brown, "Accountability, Liberty, and the Constitution," discussed in footnote 23 in this chapter.

clear constitutional principles might be justifiable, Ely pointed to the difficulty in finding any clear values in the Constitution.

Ely noted that most scholarly analyses tended to view judicial review as encompassing two types: interpretive review, or enforcement of principles and values clearly referenced by the constitutional text, and noninterpretive review, or cases where the judiciary "go[es] beyond that set of references and enforce[s] norms that cannot be discovered within the four corners of the document."[26] Ely claimed that interpretive review was an impossibility without importing some outside values to supplement the constitutional language; otherwise, there was no way to apply vague guarantees, such as those of due process and equal protection in the Fourteenth Amendment, to particular cases. Insofar as that meant that all judicial review based on "fundamental values" had to be some form of noninterpretive review, he claimed that it amounted to individual judges applying their own subjective value judgments in striking down legislation. Ely went through various sources of potentially objective values—reason, natural law, tradition, and "neutral values" in the Constitution—ultimately concluding that none of these could function as its defenders claimed. Insofar as judicial review was based on "discovering fundamental values," those values ended up being not so much discovered in the constitutional text as imposed by a judge based on his or her own preferences. In Ely's view, judicial review would represent the indefensible judicial imposition of subjective value preferences unless it could be shown that what the judiciary was doing was not overruling the majority's policy preferences based on its own ideological values, but somehow furthering the majority's work. This would occur if judicial review were

26. Ely, *Democracy and Distrust*, 1. See also Perry, *Constitution, Courts, and Human Rights*, 9ff.

primarily concerned with ensuring that the democratic process operated effectively and efficiently, and thus this meant that courts needed to focus on process rather than substance. Therefore, judicial review should function to ensure that the legislative process reflected the will of the people rather than special or vested interests, that laws were enacted based on legitimate state interests rather than prejudice against "discrete and insular minorities,"[27] and that minorities had their interests properly represented. When it came to making value judgments, however, the Constitution was so indeterminate that if they needed to be made, it should be the majority's representatives who made them.[28]

There are, however, numerous problems with Ely's "representation-reinforcing" model, including that it seems difficult under it to defend many of the Court's most celebrated opinions protecting individual liberty and autonomy.[29] Most problematic is that it fails at its own task: to free judicial review from the use of subjective value judgments. Ely recognizes that the protection of minorities requires more than a guarantee of an equal right to participate in the political process. In Ely's view, "Political

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27. The phrase famously originated as dictum in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). The case was about congressional power under the Commerce Clause, but in a footnote, Justice Harlan Stone mentioned as an aside that the Court might take into account, when reviewing the constitutionality of legislation, "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." 304 U.S. at 155n4.

28. Ely, *Democracy and Distrust*, 179.

29. In particular, the Court's entire jurisprudence based on a constitutional right to privacy—that is, protection of individual autonomy from majority control of purely personal decisions—would have to be jettisoned under Ely's theory, since such a right plays no role in "representation reinforcement." This would mean that decisions protecting reproductive freedom (*Griswold v. Connecticut*, 381 U.S. 479 [1965]; *Roe v. Wade,* 410 U.S. 113 [1973]; *Planned Parenthood v. Casey,* 505 U.S. 833 [1992]), sexual autonomy (*Lawrence v. Texas,* 539 U.S. 558) and parental rights (*Pierce v. Society of Sisters,* 268 U.S. 510 [1925]) would all have to be overturned.

access is surely important, but (so long as it falls short of majority control) it cannot alone protect a group against … out-and-out hostility, nor will it even serve effectively to correct the subtler self-aggrandizing biases of the majority."[30] Thus, once he has finished outlining the role that the judiciary can play in ensuring the proper functioning of the democratic process—including the proper representation of minorities—Ely turns to defend the Court's role in protecting minorities whose unequal treatment might violate the Equal Protection Clause. Ely again claims that this needs to be done by looking at process rather than substance, in order to prevent the type of judicial value imposition that he rejected earlier. In this case, the process approach looks at how particular legislation was passed in order to determine whether the motivating goal was prejudice against an out-group.[31] Nonetheless, though Ely tries to show that such an inquiry will reflect an objective undertaking rather than subjective value judgments of the judges, he fails to show how any interpretation of the Equal Protection Clause can be done without a fair number of such subjective judgments. For instance, the very nature of *who* needs to be treated equally is up in the air—surely imprisoned criminals need not be afforded the same liberties as free persons—as is what constitutes "equal treatment." There is no objective methodology to determine which types of classifications are unconstitutional prejudices and which are rationally related to a legitimate state goal, especially since there are differing opinions on what are legitimate state goals. Ely's approach thus fails to offer the escape from subjectivity and from the invocation of extraconstitutional values that he criticizes the "fundamental values" approach of embracing.

30. Ely, *Democracy and Distrust*, 161.

31. Ibid., 157ff.

If judicial review requires some use of values, it is crucial to understand what values can be gleaned from the constitutional text. Ely's critique would go too far if it suggested there are no values whatsoever in the Constitution. Clearly there are: they are just, on the whole, (purposefully) vague.[32] To serve as a practical limit on governmental action, as they were intended to do, these values need to be interpreted and applied by some group. Ely argues that the appropriate group is Congress: "the choosing of values is a prerogative appropriately left to the majority" and its elected representatives.[33] For the reasons outlined above, though, it makes sense to have a neutral third party be the one outlining the limits on Congress. Ely is correct that this will mean that judges' own value preferences will come into play; indeed, "there is simply no way for courts to review legislation in terms of the Constitution without repeatedly making difficult substantive choices among competing values, and indeed among inevitably controverted political, social, and moral conceptions."[34] But is this truly problematic? Is it as undemocratic and therefore illegitimate as Ely makes it out to be?

Ely would have a more forceful critique if judicial review were mandatory: that is, if our political system officially granted such power to a small group of unelected judges. If such a power were codified in the Constitution, we would need a theory to justify why we have an explicit grant of power to a group of unelected judges to overrule the popular will; we would require some theory about why judicial value imposition was acceptable.

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32. Ely admits that there are also some limits on majority power that are concrete enough that the Supreme Court could go about enforcing them without much subjectivity. His concern, though, is that the majority of what the Court actually does is the enforcement of more abstract values such as due process and equal protection.

33. Ely, *Democracy and Distrust*, 179.

34. Laurence Tribe, *American Constitutional Law* (New York: Foundation Press, 1978), 452, quoted in Ely, *Democracy and Distrust*, 43.

What Ely misses, though, is that judicial review is not a constitutionally mandated practice, but one that has evolved over time because it plays an important role—and because the other branches have consented to it, noticing that, in general, it works well to protect individual rights against majority tyranny. The lack of explicit textual authorization makes it *more* justifiable, not less—as many critics suppose—because it suggests that if the courts went too far, the other branches could push back and refuse to obey and, in doing so, would not be explicitly violating the Constitution. The continued existence of the practice suggests that the power of the elected branches is not being usurped; rather, those branches have acquiesced to the practice. And insofar as the people (through their representatives) have consented to the practice, there is no countermajoritarian difficulty: there is no reason why the people cannot decide that it is useful to have an independent body review its laws to ensure consistency with a certain group of fundamental values and give to that body some discretion and leeway to interpret those values. As Thomas Keck notes, today "[t]he very mission of an independent Supreme Court ha[s] come to be identified—in the minds of ordinary citizens, elite opinion makers, and the justices themselves—with the enforcement of rights-based limits on political action."[35] Should that change—should the Court abuse that power too much, or should popular faith in the judiciary wane to an extreme low—then the other branches could return to their pre–Warren Court practice of challenging the judiciary and its power more strongly and, possibly, even ignoring it. But the popular acceptance of the practice suggests a certain level of consent to the idea of having the judiciary play a strong role in checking the majoritarian legislative process, even if that

35. Thomas M. Keck, *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism* (Chicago: University of Chicago Press, 2004), 7.

means accepting that some of the judiciary's decisions will be based on value judgments that Congress or the president does not share.

The Court is therefore not acting illegitimately when it nullifies laws as unconstitutional, even when it is clear that there is no way to get from the vague, abstract statement of principle in the Constitution to a decision in a particular case without relying on extraconstitutional values. Of course, the farther the Court veers from the constitutional text, the more its decisions are open to criticism; but even when it adheres to the text itself, the applicability of constitutional principles is hardly self-explanatory, and it requires some subjective judgment to determine how constitutional ideals should function in particular circumstances.

Judicial Enforcement of the Separation of Powers

The division of power among the three branches of the federal government is one of the most important ways in which the Framers hoped to ensure individual liberty through constitutional structure.[36] The Framers took seriously Montesquieu's argument in *The Spirit of the Laws* that the concentration of power in one branch would lead to arbitrary governance, rather than the rule of law: "it has been eternally observed that any man who has power is led to abuse it; he continues until he finds limits… So that one cannot abuse power, power must check power by the arrangement of things."[37] In fact, part of the

36. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self[-]appointed, or elective, may justly be pronounced the very definition of tyranny." Madison, *Federalist 47*, in Hamilton et al., *The Federalist Papers and Letters of "Brutus,"* 234.

37. Montesquieu, *Spirit of the Laws*, 155. John Locke also writes in favor of the separation of legislative and executive functions in the *Second Treatise* (see Chapters 13–14), but his scheme of government omits a judicial branch and thus the possibility that a judiciary might enforce the separation of powers.

Federalists' reason for not viewing a Bill of Rights as necessary was that they recognized that institutional structure was more important to preserving liberty than written guarantees of rights. "[A] mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands."[38] What was needed, instead, was to structure the government so that, rather than relying on each branch to restrain itself, the three branches would restrain each other.

Congress and the executive have specific tools at their disposal to check each other.[39] The most notable check that the executive has on the legislature is the ability to veto legislation. But even once a law is enacted, the executive branch can shape and constrain the meaning of legislation by determining how it is applied; and executive agencies are acknowledged to have a fair amount of discretion to interpret how to apply the law.[40] Congress, though, ultimately has the formal power to write and pass legislation, and the Federalists believed that it would therefore be the most powerful branch: "In republican government, the legislative authority necessarily predominates."[41] To guard against misuse of executive authority, the Framers also granted to Congress the power over the federal budget and appropriations process, which the Federalists believe was the "most

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38. James Madison, *Federalist 48,* in Hamilton et al., *The Federalist Papers and Letters of "Brutus,"* 240–244.

39. For a comprehensive discussion of this topic, see Louis Fisher, *Constitutional Conflicts between Congress and the President*, 5th rev. ed. (Lawrence, KS: University Press of Kansas, 2007).

40. See, e.g., *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984), holding that "considerable weight should be accorded to an executive department's construction of a statutory scheme." 467 U.S. at 844.

41. James Madison, *Federalist 51*, in Hamilton et al., *The Federalist Papers and Letters of "Brutus,"* 251–255.

complete and effectual weapon with which any constitution can arm the immediate representatives of the people" to check executive overreaching.[42] By contrast, the Federalists viewed the judiciary as the weakest branch, possessing "neither force nor will, but merely judgment … and … ultimately depend[ing] upon the aid of the executive arm even for the efficacy of its judgments."[43]

Despite the judiciary's weakness, the Framers clearly believed that the Supreme Court would play some role in checking the excesses of the other branches. Explicit limits to legislative power, such as the Suspension Clause, "can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."[44] The Framers did not clarify how the judiciary would play the role of checking the other branches, but, given its constitutional power to decide "cases" and "controversies,"[45] it is not surprising that the judiciary would end up with the power of judicial review; and, once it had that power, it is not surprising that cases involving the separation of powers—not only when another branch was exceeding its respective constitutional authority, but doing so in a way that intruded on the prerogative of the other federal branches—would

42. James Madison, *Federalist 58,* in Hamilton et al., *The Federalist Papers and Letters of "Brutus,"* 282–287.

43. Hamilton, *Federalist 78*, Hamilton et al., *The Federalist Papers and Letters of "Brutus,"* 377–383.

44. Ibid.

45. U.S. Const. art. III, § 2, cl. 1.

reach its docket.[46] After all, its most famous case outlining and defending the notion of judicial review included an explication of what powers each of the two other branches possessed,[47] a necessary groundwork for making a determination of whether a law or policy exceeded constitutional limit. It is but a small step to determining not only whether the branch is acting without constitutional authority but, also, whether it is usurping another branch's constitutional authority in the process.

The intervention of the federal courts into conflicts between the two other branches has been criticized by those who argue that the Court is exceeding both its constitutional mandate and its institutional capabilities in trying to play referee between two more powerful institutions. Jesse Choper makes one of the most forceful articulations of this claim in his *Judicial Review and the National Political Process*. In Choper's view, the judiciary has an important role to play in vindicating individual rights, and it does not violate principles of democratic governance when it overturns majoritarian decisions that violate those rights.[48] However, it oversteps the proper bounds of its authority when it declares itself competent to decide questions about the balance of power between the two other branches; the president and Congress each have ways to assert their authority and strike back against usurpation of their authority by the other, and the Court should not

46. I am focusing here on the question of the separation of powers between the federal branches, not between the federal and state government. The latter is an important part of the separation-of-powers scheme and of the Court's separation-of-powers jurisdiction, but it implicates different normative concerns and is not relevant to the War on Terror cases.

47. See *Marbury*, 5 U.S. at 165ff.

48. Choper, *Judicial Review*, Chapter 2.

risk its institutional image and limited political capital by asserting it will get involved in these squabbles.[49]

Choper concedes that the Framers viewed the constitutional separation-of-powers scheme as an essential mechanism for protecting individual liberty. He acknowledges, moreover, that the separation of powers was designed to prevent a particular type of threat to individual liberty: "the exercise of arbitrary power," protection against which would "save the people from autocracy."[50] However, he views the Supreme Court's separation-of-powers jurisprudence as "distinguishable from the individual rights genre"[51] that the judiciary should practice. Insofar as violations of the separation of powers are a true threat to individual liberty, he argues, they will also violate legally protected individual rights that the judiciary is—and should be—empowered to enforce. Absent that, there is no reason for the Court to involve itself in interbranch conflicts that only implicate the other two branches.

Choper further suggests that the Court should be hesitant to intervene in a case of executive overreaching, even when individual liberty is at stake, if Congress *could have* authorized the president's action:

> [My proposal] in no way affects the Court's Authority … to decide issues of *direct* injury to constitutionally guaranteed personal liberties. The Justices should treat as nonjusticiable any claim that an individual was injured by an unconstitutional executive action if Congress constitutionally could have so acted. On the other hand, if a person contends that he was injured by an unconstitutional executive action that *neither* branch constitutionally could have taken, the Court should decide the claim.[52]

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49. Ibid., Chapter 5.

50. Ibid., 265 (quoting Youngstown Sheet and Tubing v. Sawyer, 343 U.S. 579, 629 (1952) (Douglas, J., concurring)).

51. Ibid., 274.

52. Ibid., 330; emphasis in original.

His primary example is the Korean War–era case *Youngstown Sheet and Tubing v. Sawyer*,[53] in which the Court held that President Truman could not seize and operate private steel mills in the name of furthering the war effort absent congressional authorization. "[B]ecause the steel companies conceded that Congress could have done the very thing for which they were attacking the President, and they did not contend that the Constitution granted them a right to be free from all such government conduct,"[54] there was no reason for the Court to intervene and declare that the president's actions were unconstitutional, according to Choper. Had Congress disagreed, it could have utilized its own inherent powers to challenge the president's actions, and the absence of such intervention indicates that Congress did not view the mill seizures as a serious usurpation of its authority.

There are numerous deficiencies in Choper's argument. First, his proposal would greatly aggrandize executive authority by confusing what Congress *could do* from what it *has done*. This goes back to the distinction in the previous chapter between arbitrary governmental action and action pursuant to the law. Statutory authorization would require debate, discussion, and acquiescence of a majority of legislators, not just a single person (and in *Youngstown*, it would require acquiescence to a serious governmental intrusion on private property). It would also give the steel mill owners an understanding of what legally could happen to their property during wartime and a chance to make plans in case of such an occurrence. Granting one individual the right to make that decision, without

53. 343 U.S. 579 (1952). This case is discussed further in the next chapter; see pages 90–91.

54. Choper, *Judicial Review*, 326.

any advance notice, and without any debate on whether it was truly necessary for the war effort, eliminates these procedural protections.

Second, there is no reason to assume that the failure of Congress to challenge the president amounts to its implicit support of such an action. Congress may have decided that, in picking its battles, seizure of a few steel mills seemed unimportant in the greater scheme of things. There is no reason to assume that a legislative body will view discrete intrusions into individual property rights as worth its time or effort to combat.

Third, the same functionalist reasons for having one branch have the final say on what the Constitution requires come into play when dealing with the separation of powers. In many cases, especially dealing with the modern administrative state, it is unclear under what circumstances a separation-of-powers violation has actually occurred.[55] What is the limit of agency discretion in interpreting federal statute? When does agency rule making rise to the level of executive usurpation of Congress's legislative function? While these cases could proceed as unending fights between Congress and the executive, having a neutral third party such as the judiciary settle these disputes, and interpret the constitutional grants of authority to each branch, allows for more efficient government operation and ensures that the balance of power accurately reflects the constitutional design.

Fourth, Choper assumes that separation-of-powers violations that affect individual liberty will, when severe enough to warrant judicial intervention, also affect separate

55. Admittedly, the Supreme Court has not done a particularly good job at outlining the criteria for its separation-of-powers jurisprudence; see, e.g., Rebecca L. Brown, "Separated Powers and Ordered Liberty," *University of Pennsylvania Law Review* 139, no. 6 (1991): 1517, referring to the Court's jurisprudence in this area as an "incoherent muddle." This does not suggest that the Court shouldn't have power to decide cases in this area; it merely points to the need for the Court to adopt clearer rules for explicating how the separation of powers should operate in the modern world.

legally protected rights. In many cases, especially those dealing with the rights of citizens, this will be true. But as the discussion of structural rights in the previous and later chapters should make clear, there are instances where some individuals, lacking other legal rights, can obtain basic judicial protections simply by ensuring that the branches are each held within their proper sphere of power.

Finally, judicial limitation of the other branches to their authorized constitutional powers plays an important role in preventing the gradual aggrandizement of power over time. In any one case—such as the seizure of steel mills during wartime—the stakes may look low. Over time, however, the accumulation of such powers in one branch may begin to distort the entire structural division of power between the branches, bringing about the "abridgment of the freedom of the people by gradual and silent encroachments of those in power."[56] Indeed, this slippery-slope concern provides a reason, independent from the rights- and liberty-based argument in the previous chapter, for why it is important to hold the federal government to constitutional limits in areas such as imprisonment and executive detention, even when neither citizens nor legal residents in the United States are directly affected.[57] The creation of the institutional capacity for actions such as arbitrary imprisonment of noncitizens abroad creates conditions that make it much easier for the federal government to exceed its proper limits in the treatment of citizens. This is particularly the case with executive power claimed in the name of security. For instance, granting the executive greater latitude to conduct surveillance operations abroad, against

56. James Madison, "Speech in the Virginia Ratifying Convention in Defense of the Constitution," June 6, 1788, http://www.constitution.org/rc/rat_va_05.txt.

57. See the clarification in the Conclusion (pages 231–233) about why this argument need not be taken to the libertarian extreme of arguing that recognizing the federal government as holding anything beyond minimal-state functions risks an unconstitutional tyranny.

those who lack most constitutional protections, has frequently led to the use of such tools domestically, likely in violation of the Fourth Amendment.[58] Statutes controlling such activities have been read broadly by the executive branch to justify its actions,[59] and Congress has had difficulty reining in the executive—or even learning about the full extent of such programs—once they have been instituted.[60] There is thus a strong reason for the judiciary to insist that, in areas where the accumulation of power might *later on* pose a threat to citizens' liberty if it exceeds constitutional limits, the power of each branch remains highly circumscribed.

Choper presents valid concerns that the Court may harm its institutional reputation and capital should it become overly involved in conflicts between the other branches. However, complete abstention from deciding any of these cases would be counterproductive. Instead, the concerns he raises suggest, not that the Court should stay entirely out of these interbranch debates, but that it be cautious about when and how it intervenes. Indeed, what Choper's argument points toward is the judicious (so to speak) use of judicial review, where the Court takes into account practical circumstances that might suggest that it is better to remain uninvolved, at least at a particular time. The justiciability doctrines discussed below, especially the "political question" doctrine, allow

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58. In the 1970s, the Church Committee found that the Central Intelligence Agency was violating its own charter by conducting domestic surveillance activities. More recently, documents disclosed by Edward Snowden show that the National Security Agency has been engaged in massive warrantless interception of emails and phone calls, which one judge has declared unconstitutional. Klayman v. Obama, 957 F. Supp. 2d 1 (D.D.C. 2013).

59. See the discussion of how the Obama Administration has interpreted the Foreign Intelligence Surveillance Act and the USA PATRIOT Act in *Klayman*, 957 F. Supp. 2d at 11–19.

60. See, e.g., Ryan Lizza, "State of Deception," *New Yorker*, December 16, 2013, http://www.newyorker.com/magazine/2013/12/16/state-of-deception; Scott Shane, "Democrats say C.I.A. Deceived Congress," *New York Times*, July 8, 2009, http://www.nytimes.com/2009/07/09/us/politics/09intel.html.

the courts that latitude, while also granting them the ability to intervene where appropriate.

The Court's separation-of-powers jurisprudence does not only involve questions about the proper division of power between the executive and legislative branches. It also involves questions about the relationship between those two branches and itself. In *Boumediene*, for instance, the Court argued that the actions of Congress raised "troubling separation-of-powers concerns"[61] because it represented an encroachment on the Court's habeas jurisdiction, even though both the executive and legislative branches favored it. Having the Court decide on when its own institutional authority has been usurped presents a troubling conflict of interest, as it might seem unlikely that a branch would find in favor of a limit on its own power. I will leave this question for now because its resolution relates to the reality of the judiciary's power discussed below: the fact that its authority rests on its political capital with the other branches (and the public), and with such an unstable foundation, it recognizes that an over-aggrandizement of its own power might provoke a backlash.

The Growth of Judicial Supremacy in the Twentieth Century

The discussion above explains the importance of judicial review, including in separation-of-powers cases, but it doesn't touch upon how the courts have gone about translating these normative concerns into an ability to carry out its function of enforcing constitutional restrictions on the other branches. The judiciary alone cannot determine whether it will reign supreme as the arbiter of what is constitutional. As Mark Graber

61. *Boumediene*, 553 U.S. at 764.

notes,

> Judicial authority has political foundations. Justices only have the power to declare laws unconstitutional, in a politically significant sense, when … the courts are vested with jurisdiction over cases raising constitutional questions … outsiders do not exercise undue influence over judges considering constitutional issues, and judicial decisions declaring laws unconstitutional are obeyed.[62]

Historically, the Court has faced numerous situations where its constitutional holdings have simply been ignored. As Keith Whittington remarked, "Though [President Andrew] Jackson may not have declared, 'John Marshall has made his decision, now let him enforce it,' it was common in the contemporary press that the president might refuse to enforce the Court's decision based on his theory of the independence of the coordinate branches."[63]

The difference between the Supreme Court's behavior during the World War II–era and War on Terror habeas cases reflects an immense change in how the Court has been perceived by the other branches and the public. World War II began not long after the Court faced one of the most serious challenges in American history to its institutional credibility: Roosevelt's court-packing plan during the New Deal, and the subsequent "switch in time" without which Roosevelt's attacks on the Courts would likely have continued unabated and the Court's public image would likely have continued to degrade, as the country viewed its dogmatic approach to laissez-faire capitalism as a serious threat to the economic well-being of a majority of Americans. As Robert McCloskey has noted, prior to the "switch in time" the Court had "dangerously overstepped the line that marks

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62. Mark Graber, "James Buchanan as Savior? Judicial Power, Political Fragmentation, and the Failed 1831 Repeal of Section 25," *Oregon Law Review* 88 (2009): 106.

63. Whittington, *Political Foundations of Judicial Supremacy*, 33.

the limit of its authority,"[64] and Roosevelt's reelection in 1936 reflected widespread popular approval of his New Deal programs and popular rejection of the Court's jurisprudence in economic matters.[65] Although the court-packing plan failed and would likely have failed even without the "switch in time," Roosevelt's attacks on the Court no doubt injured the public perception of the Court's legitimacy, as he portrayed it as an out-of-control institution that had "improperly set itself up as a third house of the Congress—a super-legislature, as one of the justices has called it—reading into the Constitution words and implications which are not there, and which were never intended to be there."[66] Moreover, even though the switch may have been "independent of (in fact, prior to) the announcement of the [court-packing] plan,"[67] it appeared to many that the Court—or, more specifically, then–Justice John Roberts—was finally succumbing to criticism: the Court had either erred and was showing how fallible it had been in second-guessing the combined determination of the political branches, or it was capitulating out of fear that it would lose its institutional power if it stood by principle.[68]

If the Court had exceeded the proper limits of its power by intervening in domestic economic-policy matters, its involvement in wartime military decision making and issues of foreign policy would have been even more audacious. As late as 1950, Clinton Rossiter could argue that, during wartime, the judiciary was "powerless" to prevent the

64. McCloskey and Levinson, *The American Supreme Court*, 117.

65. Ibid.

66. Franklin Delano Roosevelt, "Fireside Chat," March 9, 1937, transcript, http://www.presidency.ucsb.edu/ws/index.php?pid=15381.

67. Ely, *Democracy and Distrust*, 46.

68. McCloskey and Levinson, *The American Supreme Court*, 117.

executive branch from instituting martial law domestically at his whim, contra *Ex Parte Milligan*[69]; from suspending the writ of habeas corpus, notwithstanding *Ex Parte Merryman*[70]; and from using its war powers to "play hob with personal and property rights"[71]:

> The government of the United States, in a case of military necessity proclaimed by the President, and a fortiori when Congress has registered agreement, can be just as much a dictatorship, after its own fashion, as any other government on earth. The Supreme Court of the United States will not, and cannot be expected to, get in the way of this power.[72]

The Court's decisions during the War on Terror would seem to indicate that this is no longer the case; at the very least, the Court can expect that if it decides to intervene and issue a constitutional ruling, the political branches will follow its pronouncement, however much they disagree with it.

The Court's newfound ability to affect the behavior of the political branches even during wartime has much to do with the dramatic growth of judiciary supremacy during the twentieth century that came out of the Warren Court's aggressive use of judicial review in the 1950s and 1960s. Prior to the 1950s, the Court "was willing to adopt fairly sweeping, rights-protecting rhetoric, but was not yet willing to enforce that rhetoric in actual practice."[73] However, against claims "that frequent judicial intervention in the

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69. Rossiter, *Supreme Court*, 53. See below, page 137, for a discussion of *Ex Parte Milligan*, 71 U.S. 2 (1866), the Civil War–era case in which the Supreme Court barred the use of martial law as long as the civilian courts were operational.

70. Rossiter, *Supreme Court*, 18–19. See below, page 136, for a discussion of *Ex Parte Merryman*, 17 F. Cas. 144 (1861), in which the Court asserted that only Congress could constitutionally suspend habeas corpus.

71. Rossiter, *Supreme Court*, 3.

72. Ibid., 54.

73. Keck, *Most Activist Supreme Court*, 46–47.

political process would generate such widespread political reaction that the Court would be destroyed in its wake,"[74] the Warren Court repeatedly inserted itself into controversial and politically charged issues and demanded that its constitutional holdings be followed. Although the Warren Court "did not seek to impose its own constitutional (or political) vision on the coordinate branches of the national government"[75] and its "justices saw themselves as working in active partnership with the Democratic Congress and president … to enforce widely held national values against infringement by local outliers,"[76] its repeated involvement in national politics, and its strong assertion of the Court's prerogative to strike down legislation infringing on constitutional rights, set a precedent for future Courts. "By the end of the Warren era, judicially enforceable constitutional rights had become entrenched as a core feature of modern American democracy,"[77] and later justices would no longer see much difference between policing "local outliers" and demanding that the federal government act according to the justices' constitutional views. In fact, as the Court has become more conservative over the last three decades, its justices have adapted the notion of judicial nullification of unconstitutional laws to serve their own mission of reducing the power of the federal government. Far from rejecting the idea of an "activist judiciary" and granting the elected branches more discretion in policymaking, "the Rehnquist Court launched a new federalism offensive that emphasized both the limits on congressional authority under the Constitution and the

74. Henry P. Monaghan, "Constitutional Adjudication: The Who and When," *Yale Law Journal* 82, no. 7 (1973): 1366, quoted in Ely, *Democracy and Distrust*, 47.

75. Keck, *Most Activist Supreme Court*, 93.

76. Ibid.

77. Ibid., 101.

extent of judicial authority over it."[78] Conservative justices in the Rehnquist Court "carved out a number of new doctrines subjecting Congress to new constitutional limitations,"[79] and "[i]n its view toward federal legislative power … the later Rehnquist Court [was] the least deferential of any in the history of the U.S. Supreme Court,"[80] though by now it may have been eclipsed by its successor, the Roberts Court.

The flip side of the Court's willingness to aggressively involve itself in certain cases is a recognition that its legitimacy can be harmed when it oversteps its authority or inserts itself into matters better left to the elected branches. It might seem inconceivable today that the other branches would ignore a dictate from the Supreme Court, but, as noted above, its unquestioned authority to decide constitutional questions and have them followed is relatively new in American history. It rests upon its political capital with the other branches and the popular acceptance of its supremacy in interpreting the Constitution, and, as Choper has argued, "The people's reverence and tolerance is not infinite and the Court's public prestige is exhaustible."[81]

As a way to ensure it does not overextend itself, the judiciary has recognized that one of the most important aspects of its job is deciding *not* to intervene in many controversial cases. Former Yale Law Professor Alexander Bickel advocated this approach when he spoke of the "passive virtues," those "techniques…for staying the Court's hand. They are the most important thing, because they make possible performance of the Court's grand function as proclaimer and protector of the goals. These are the techniques that allow

78. Whittington, *Political Foundations of Judicial Supremacy*, 278.

79. Ibid., 279.

80. Keck, *Most Activist Supreme Court*, 2.

81. Choper, *Judicial Review*, 139.

leeway to expediency without abandoning principle. Therefore they make possible a principled government."[82]

The Supreme Court has several such abstention tools at its disposal, including its discretion in granting certiorari. However, lower courts usually do not have the ability to abstain from cases at will; instead, if they wish to avoid hearing cases that they would rather not decide, they have to invoke justiciability doctrines. These doctrines are not intended to be "prudential" tools, reflecting the wisdom of intervening; primarily, they are supposed to be jurisdictional ones, addressing whether the courts have the legal and constitutional authority to hear particular cases. Nonetheless, doctrines such as ripeness (whether the case is ready to be heard by the court), mootness (whether the case is still at issue), and standing (whether the litigants have a right to ask a court to intervene and offer relief) have been used by both lower courts and the Supreme Court to dispose of controversial cases that would place the judiciary in an awkward position vis-à-vis the political branches. The applicability of these doctrines to particular cases is subjective enough to allow a court to argue that the necessary requirements have not been met if it wants to avoid hearing a case or, in turn, that they have been met if it wants to issue a ruling.

As will be seen in later chapters, standing has been a particular issue in the War on Terror cases because of the question, not of whether the judiciary has the power to intervene in cases of potentially unlawful executive detention, but whether the detainees

82. Bickel, *Least Dangerous Branch*, 71.

have the right (or "privilege"[83]) to ask the courts for that intervention. At the root of standing is the question of "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues"[84]; other aspects of standing in a case—whether the plaintiffs have suffered a judicially cognizable injury,[85] whether there is a clear "causal connection between the injury and the conduct complained of,"[86] and whether the courts are in a position to offer the plaintiffs relief[87]—are secondary to the more fundamental question of whether the plaintiffs have a right to access the courts in the first place. That is, it is possible that, though the federal government has engaged in an illegal or unconstitutional action, those affected have no right to seek redress in courts. That was part of the Court's finding in *Eisentrager*, when it dismissed the detainees' habeas suit; and it is part of how the Court has revised its habeas jurisprudence, by recognizing that even foreign nationals abroad should have standing to sue to enforce certain constitutional limits on the federal government, by virtue of how they affect the separation of powers, when transgressions of those limits places their liberty at stake.

The judiciary has also shaped its method for deciding the cases it hears to reflect the desirability of not reaching constitutional holdings unnecessarily. Under the doctrine of constitutional avoidance, courts purposefully try to settle cases on grounds other than

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83. Both *Eisentrager* and *Boumediene* use the language of the "privilege of litigation" rather than a "right" to access the courts, likely because the Constitution speaks of the "Privilege of the Writ of Habeas Corpus" (art. I, § 9, cl. 2).

84. Warth v. Seldin, 422 U.S. 490, 498 (1975).

85. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992); Allen v. Wright, 468 U.S. 737, 750 (1984).

86. *Lujan,* 504 U.S. at 560.

87. *Id*.

constitutional interpretation, if at all possible. Because judicial nullification of a law or executive action for unconstitutionality requires the judiciary to overrule another branch's judgment, the Supreme Court has recognized it should be a "last resort"[88]: "It must be evident to any one that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility."[89] Thus, if a case raising constitutional questions can be settled through some other mechanism, the Court has preferred to go that route.

Constitutional avoidance primarily arises in the context of statutory interpretation; as described by Justice Louis Brandeis almost eighty years ago, "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."[90] As will be seen in the discussion of *Rasul* and *Hamdan*, the Court sometimes prefers to give creative or counterintuitive readings to laws in order to square them with constitutional requirements. The same normative concerns that lead the Court to avoid making unnecessary constitutional claims in its statutory interpretations apply in other contexts in which it engages in constitutional interpretation, such as determining the "inherent power" of the president under Article II. This will be seen throughout the War on Terror

88. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring), quoting Chicago & Grand Trunk Ry. Co. v. Wellman*,* 143 U.S. 339, 345 (1892).

89. Thomas M. Cooley, *A Treatise on the Constitutional Limitations which Rest upon the Legislative Power of the States of the American Union,* 8th ed. (Boston: Little, Brown, and Company, 1927), 332, quoted in *Ashwander,* 297 U.S. at 345 (Brandeis, J., concurring).

90. *Ashwander*, 297 U.S. at 348 (Brandeis, J., concurring).

cases, where the Court avoided making judgments about whether, or to what extent, the president had inherent power to detain noncitizens abroad indefinitely and subject them to military commissions, and instead shifted the debate to whether presidential action was in keeping with relevant statutory provisions that regulate those areas. It was only once those attempts to avoid a constitutional judgment failed that the Court resorted to asking what the Suspension Clause required in the Guantanamo context.

The Political Questions Doctrine

In its wartime and foreign policy jurisprudence, the judiciary has held that many issues fall outside its jurisdiction because they are "political questions." Political questions refer to those issues that are nonjusticiable because they are "of a peculiarly political nature, and therefore not meet for judicial determination,"[91] though the courts have historically been inconsistent in their application of the political question doctrine (PQD).

As constitutional scholars such as Rachel Barkow and Louis Henkin have pointed out, the PQD, like many of the justiciability doctrines, is actually two separate doctrines: one is a jurisdictional limit on what the Court has authority, under the Constitution, to decide (the "classical" PQD), whereas the other is a prudential doctrine that the courts invoke as a way to avoid certain cases that they could, but do not want to, decide.[92] The classical PQD is arguably not even a doctrine: it is really just the recognition of the fact that the "Constitution carves out certain categories of issues that will be resolved as a

91. Colegrove v. Green, 328 U.S. 549 (1946), *overruled by* Baker v. Carr, 369 U.S. 186 (1962).

92. Rachel E. Barkow, "The Rise and Fall of the Political Question Doctrine," in *The Political Question Doctrine and the Supreme Court of the United States* ed. Nada Mourtada-Sabbah and Bruce E. Cain (Plymouth, UK: Lexington Books, 2007), 24.

matter of total legislative or executive discretion."[93] The courts cannot intervene to stop the political branches from making certain policy choices—for instance, Congress's decision whether or not to declare war—if the Constitution places no limitations on such decisions that the courts could enforce. As Louis Henkin describes it, "That there are political questions—issues to be resolved and decisions to be made by the political branches of government and not by the courts—is axiomatic in a system of constitutional government built on the separation of powers…. One needs no special doctrine to describe the ordinary respect of the courts for the political domain."[94]

The prudential PQD is different: it has been invoked by the courts not because there are no constitutional or legal standards for the courts to enforce, but because the courts, for one reason or another, have decided that it is wise "not to enter this political thicket."[95] Bickel noted that the prudential PQD developed out of the judiciary's

> sense of lack of capacity [in certain political matters], compounded [in any given case] in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally ("in a mature democracy"), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.[96]

In Bickel's formulation, the foundation of the prudential PQD is a court's own view of its limitations: whether it has the "capacity" to make certain decisions, whether its judgments will be balanced, whether it is institutionally well-situated to intervene. One

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93. Ibid. See also Jonathan R. Siegel, "Political Questions and Political Remedies," in *The Political Question Doctrine and the Supreme Court of the United States* ed. Nada Mourtada-Sabbah and Bruce E. Cain (Plymouth, UK: Lexington Books, 2007).

94. Louis Henkin, "Is There a Political Question Doctrine?" *Yale Law Journal* 85, no. 5 (1976): 598.

95. *Colegrove*, 328 U.S. at 556.

96. Bickel, *Least Dangerous Branch*, 184.

could add to this list the desire of the courts to avoid unnecessary conflicts with the political branches, which could cost the judiciary institutional standing and prestige—especially, in earlier times, if its decisions were ignored.

Over the last half century, the Court has become less hesitant to intervene in cases arguably involving political questions. Many scholars argue that this is the way it should be: because "the Constitution exists to restrict what the government may do,"[97] it makes no sense for the Court to avoid political questions altogether when its job is to enforce constitutional limits on the political branches. According to Erwin Chemerinsky, "The whole point of placing something in a Constitution is to insulate it from the political process. In essence, some constitutional provisions are made meaningless when matters are deemed to be political questions."[98] This does not mean that the Court should refuse to recognize that any cases are outside its purview; the classical political question doctrine (insofar as it can be called a doctrine) forces the courts to abstain when there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department"[99] or "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion."[100] In such cases, the Supreme Court has recognized, judicial involvement would violate the separation of powers by intruding on

97. Erwin Chemerinsky, "Who Should Be the Authoritative Interpreter of the Constitution? Why There Should Not Be a Political Question Doctrine," in *The Political Question Doctrine and the Supreme Court of the United States* ed. Nada Mourtada-Sabbah and Bruce E. Cain (Plymouth, UK: Lexington Books, 2007), 182.

98. Ibid., 193.

99. *Baker,* 369 U.S. at 217.

100. *Id.*

policy decisions over which the Constitution gives the political branches discretion.[101] However, when the courts invoke the prudential PQD, they refuse to decide cases that are within their jurisdiction and arguably should be decided by the judiciary.

Critics of the prudential PQD note that many of the reasons that have been given by the courts to abstain from involvement are "contradicted by the institution of judicial review itself."[102] For instance, "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"[103] has been claimed as a reason for invoking the PQD. But if one of the political branches is acting unconstitutionally, it is the judiciary's responsibility—if one accepts the functionalist justification of judicial review given above—to intervene and stop it; the idea that it should abstain from its constitutional duty because it could be seen as disrespectful to the other branches "ha[s] the potential for swallowing judicial review entirely."[104] Likewise, in the excerpt above, Bickel lists the "momentousness" of an issue, "which tends to unbalance judicial judgment," as a reason for the judiciary not to get involved, but, since a momentous issue is likely to "unbalance" the decision-making processes of the political branches, it is hardly a reason for the courts to disengage from involvement altogether; arguably, the more significant and controversial an issue, the

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101. *Id.* See also *Marbury*, 5 U.S. at 165–166 ("By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience … whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.")

102. Louis Henkin, *Constitutionalism, Democracy, and Foreign Affairs* (New York: Columbia University Press, 1990), 89, quoted in John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath* (Princeton, NJ: Princeton University Press, 1993), 177n54.

103. *Baker*, 369 U.S. at 217.

104. Ely, *War and Responsibility*, 177n54.

more important it is for the courts, if they properly have jurisdiction over the matter, to weigh in on it so as not to allow the political branches to act without proper consideration of the law.

Because the prudential PQD leads the judiciary to abstain from cases over which it has proper jurisdiction, it has, according to its critics, become largely anachronistic. However, that depends on whether it is seen as a way for the judiciary to shirk its responsibility to decide controversial cases, or, like the other justiciability doctrines, as a way for the judiciary to have control over when and under what circumstances it hears cases. The justiciability doctrines operate to give the courts the opportunity to let the political branches handle certain cases first, potentially keeping the judiciary from having to get involved. They also, as noted earlier, give public opinion an opportunity to catch up with the courts' constitutional views, preventing them from continually (and unnecessarily) releasing opinions that might cause the public to question whether an unelected branch should be overruling the decisions of the democratically elected branches. However, if there are legitimate questions about which branch has a particular power, or whether the separation-of-powers scheme in the Constitution has been transgressed, then invocation of the PQD is misplaced when the judiciary is in the best position to serve as a neutral arbiter and a final interpreter of the Constitution.

Judicial Review and the Guantanamo Cases

This functionalist justification given above provides a reason why judicial review is useful. It does not establish that it is *necessary*. It does not need to, as the normative justification of the practice does not rely on its being the only acceptable way to run a

republican government. Several critiques of judicial review seem to miss that point, assuming that it is all or nothing: either judicial review is an essential part of our constitutional order, or it is an illegitimate usurpation of congressional power. Instead, it is helpful to view judicial review as a mechanism that has evolved over time because it helps ensure the functioning of the democratic process and a balance between governmental power and individual liberty. And it is a mechanism that has popular acquiescence, if not outright approval. Should that change, the other branches could push back—there is no formal constitutional grant of power to the judiciary preventing them from doing so—or a constitutional amendment could theoretically be adopted that eliminates or severely limits the judiciary's power. The failure of the other branches to do so—indeed, the great public acceptance of the idea that the Court plays an important role in preventing tyranny of the majority—suggests that the legitimacy of judicial review is not as problematic as some constitutional scholars have claimed.

The fragile nature of the judiciary's institutional power is also why (to return to a question raised above) the Supreme Court has historically recognized important limits on its own authority in separation-of-powers cases involving a conflict between itself and other branches: that is, it has been willing to find that it lacks the power to hear certain cases or engage in certain remedial action.[105] This may seem like a surprise given the tendency of political institutions to aggrandize their own power to no end. However, the Constitution specifically grants Congress the authority to decide the Supreme Court's appellate jurisdiction and the scope of the lower courts' judicial power, and the Court has recognized and adhered to these limits in most contexts. There are, of course, exceptions,

105. The most famous example, of course, being *Marbury*.

and habeas corpus is a prime example: as discussed in Chapter IV, the Court has held that the Suspension Clause places limits on Congress's authority to restrict its habeas corpus jurisdiction. Nonetheless, in the majority of cases, the Court has recognized that its jurisdiction is not absolute, that Congress rightfully can restrict much of it, and that it would exceed its constitutional mandate if it held that its non-textually-derived power of judicial review trumped the explicit textual grant of power to Congress to decide the jurisdiction of the federal courts in the types of cases not explicitly mentioned in Article III. In turn, Congress, recognizing the important role that the judiciary plays in resolving disputes, has granted the courts wide latitude to hear cases, even those touching upon sensitive political matters and those that could embarrass elected officials. This is a fragile and dynamic relationship, and it depends on the Court's being seen as using judicial review not as a pure instrument of power but to uphold certain fundamental values and to protect individuals from the excesses of majoritarian rule.

In the context of the War on Terror cases, the Court argued that it was upholding the important value of individual liberty against arbitrary detention. It did so by turning to two principles clearly emphasized in constitutional text and history: the availability of habeas corpus, as guaranteed by the Suspension Clause, and the separation of powers among the three branches, as established by the constitutional structure. Enforcement of the availability of habeas would seem, at first glance, not to require any resort to extraconstitutional values. Or at least it doesn't when it involves U.S. citizens. What about when it implicates the rights of foreigners?

The criticism that the Supreme Court received for intervening in the Guantanamo cases was not that it was improper for the Court to hear habeas cases. It was that the

Suspension Clause and the federal habeas statute were never intended to cover foreign nationals outside the country. If the Court was to assert that foreign nationals abroad could sue in court to enforce the structural limitations on Congress that ensure their freedom from arbitrary detention, it couldn't be through mere textual exegesis. It would have to rely on outside values, such as the expansive awareness about the universal nature of the right to liberty discussed in the previous chapter. To someone like Ely, this might appear to be an illegitimate imposition of the justices' own subjective value judgments on the political branches. Given the argument above, though, it should be clear that the Supreme Court should be granted some leeway to determine how fundamental constitutional values should function in their modern-day application; and it is therefore not illegitimate for the Court to hold—based on an expansive reading of the Suspension Clause and the separation of powers doctrine—that the federal government lacks the power to arbitrarily capture and indefinitely imprison people, many of whom committed no crime, even if those people lack the extensive due process protections afforded to citizens and resident nationals.

Chapter III: The Supreme Court in Foreign Policy

As noted in the introduction, the federal courts have traditionally avoided questioning the legitimacy of presidential actions conducted during times of conflict—at least those taking place overseas. The courts have frequently dismissed pleas to intervene in cases where they felt that their involvement was inappropriate or that the political branches should be given wide latitude. Nonetheless, during the War on Terror, the Supreme Court has shown that there are some cases involving unjust executive detention in which it can and will intervene. In particular, it will adjust its habeas corpus jurisprudence to encompass a wider scope of prisoners and detainees under its protection. However, the Court has maintained its traditional refusal to intervene in other foreign policy issues, even when it arguably has the constitutional authority to do so, recognizing that those are better left to the democratically elected political branches: Congress and the presidency.

In the first part of this chapter, I look at the practical and normative considerations that must underlie all of the judiciary's thinking about its role in foreign policy, especially during times of armed conflict. In discussing the doctrines that the Supreme Court has developed to guide its jurisprudence in those areas, I also provide a history of the Supreme Court's relationship to foreign policy. I then turn to the key focus of this chapter: the question of the treatment of foreign combatants, and why the Court has, during the War on Terror, reversed its World War II–era decisions that gave the executive branch almost unfettered latitude to treat foreign nationals detained abroad as it pleases. I discuss the paradigm of war that underlay the Court's World War II-era jurisprudence, and how that paradigm changed as a result of the Bush administration's

decisions about fighting the War on Terror, including policies that have remained in place and been defended by the current Obama administration.

The Judiciary in Wartime and in Foreign Policy: Some Practical and Normative Considerations

The topic at hand presents two related but separate questions: one is the normative question of the role that the judiciary should be taking in intervening in foreign affairs, including prosecuting a war. That debate raises considerations about the proper deference that the judiciary should give to the other coordinate branches of government under the separation-of-powers scheme established by the Constitution. It requires analysis of whether the courts have *any* role to play during wartime, or if, as Cicero believed, "*silent enim leges inter arma.*"[1] Cicero's quote raises a second question, the practical one: whether the courts, and the laws they enforce, *can* have any effect during wartime, or whether bold pronouncements about civil liberties, separation of powers, and constitutional limitations on executive authority will be met by indifference and ignored by those with true military power. As I discuss below, the Supreme Court's practical assessment of its own powers often shapes how the justices regard their role: practical considerations, in other words, can affect the normative analysis. Yet they can also present entirely separate considerations insofar as the Court may want to intervene in a case, or even sees itself as having the duty to intervene, but believes there is little it can do to effect a just outcome.

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1. "For the laws fall silent amid the clash of war." Marcus Tullius Cicero, *Pro Milone*, in *Cicero: Vol. XIV*, trans. N. H. Watts (Cambridge, MA: Loeb Classical Library 1931), 11, quoted in William M. Wiecek, *The Birth of the Modern Constitution: The United States Supreme Court, 1941–1953* (New York: Cambridge University Press, 2006), 285.

Historically, the Court has had three options when faced with presidential actions that it viewed as unconstitutional: it could go against the president, even knowing that its decision might be ignored; it could find reasons to justify the president's actions, despite awareness of their unconstitutionality; or it could find a reason to avoid weighing in at all. In all three options, the Court faced risks to its public legitimacy and standing. If it pursued the first path, the Court could be seen "as impotent to enforce its mandates"[2]; it exposed the extent to which the judiciary, lacking its own methods of enforcement, relies upon the goodwill and obedience of the other branches to carry out its decisions. However, if it pursued the second option, it failed to act as an independent body that is devoted to principle, looking instead to political expediency. It opened itself up to criticism that it was not living up to its constitutional duty, and its opinion would likely be subject later to harsh criticism from outside observers, especially if the Court had to make implausible legal claims to reach its preferred outcome.

As with the first option, the third could make the Court a party to injustice: by declaring that it will not hear a case, the Court effectively closes down an important avenue of redress for those who feel their rights have been violated. Yet avoiding a case entirely can represent a better outcome than reaching a manifestly unjust and legally unsound decision; and it avoids the institutional damage that can come from issuing a decision that is ignored. This is why the Court has fashioned the abstention doctrines discussed in Chapter II: to allow it to stay out of the fray when it feels involvement is inappropriate or threatens its standing.

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2. Robert G. McCloskey and Sanford Levinson, *The American Supreme Court*, 4th rev. ed. (Chicago: University of Chicago Press, 2005), 26.

The Judiciary's Involvement in Foreign Policy

In the previous chapter, I discussed how the political question doctrine has emerged as one way for the judiciary to abstain from deciding cases it does not want to consider, especially those involving foreign policy. However, as critics of the doctrine point out, abstention from foreign policy matters is a largely recent phenomenon. The early Supreme Court did not abstain from deciding cases that were otherwise within its jurisdiction just because they touched upon foreign affairs (and even if the Court had little practical way to ensure compliance with its decisions). In one particularly important area, the separation of powers, the early Court repeatedly asserted its prerogative of judicial review. In *Bas v. Tingy*[3] and *Talbot v. Seeman*,[4] for instance, the Court declared that only Congress could declare a war, and in *Little v. Barreme*[5] the Court stated that the president cannot transgress statutory limits properly established by Congress, even in foreign affairs.

Yale Law Professor Harold Koh has noted that "even during America's infancy, the time of its greatest national insecurity, foreign affairs were not treated as exempt from the ordinary constitutional system of checks and balances."[6] In fact, "[l]ooking back upon this first era of constitutional history, perhaps its most striking feature is the extent to which the courts actively participated in the delineation and delimitation of the

3. 4 U.S. 37 (1800).

4. 5 U.S. 1 (1801).

5. 6 U.S. 170 (1804).

6. Harold H. Koh, *The National Security Constitution: Sharing Power After the Iran-Contra Affair* (New Haven, CT: Yale University Press, 1990), 83.

executive's authority in foreign affairs."[7] Only later did the judiciary begin invoking the PQD to disengage itself from foreign policy matters, even when the separation-of-powers issues involved were proper for judicial review:

> Such a general judicial power, nay duty, to invalidate decisions made by a government official or agency other than the one to which they were entrusted by the [Constitution], is constitutionally unproblematic. It has become moderately fashionable to assert, however—normally under the general heading of the "political question doctrine"—that there is something special about cases involving "foreign affairs" that renders such an ordinarily routine judicial exercise improper. In such wholesale form, however, this is just that—assertion—unsupported by Supreme Court precedent and affirmatively refuted by the language of the Constitution.[8]

Often the prudential PQD has been invoked by the judiciary to avoid decisions about the war powers and whether the president can use the military abroad without prior congressional authorization. However, according to some scholars, this is a vitally important separation-of-powers area, as the Framers deliberately placed the war-making authority in congressional hands, believing that group decision making was superior to that of one person, and that the president, if he or she had such power, would rush the country into unnecessary, destructive wars.[9] Notes political scientist David Gray Adler, "The structure of shared powers in foreign relations serves to deter the abuse of power, misguided policies, irrational action, and unaccountable behavior."[10] By refusing to enforce this fundamental constitutional tenet, this line of reasoning goes, the courts have allowed the president, over the last half century, to engage in a series of unilateral

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7. Ibid., 81.

8. Ely, *War and Responsibility*, 54–55.

9. Neal Devins and Louis Fisher, *The Democratic Constitution* (New York: Oxford University Press, 2004), 103–107; David Gray Adler, "Court, Constitution, and Foreign Affairs," in *The Constitution and the Conduct of American Foreign Policy* ed. David Gray Adler and Larry N. George (Lawrence, KS: University of Kansas Press, 1996), 23.

10. Adler, "Court, Constitution, and Foreign Affairs," 23.

conflicts of questionable worth and benefit, exactly as the Framers feared. During the Vietnam War, for instance, federal district and appeals courts invoked the prudential PQD to avoid ruling on the constitutionality of Richard Nixon's bombing of Cambodia without congressional authorization. The courts, it should be noted, were not called upon to decide a policy matter: whether the government should be bombing Cambodia. Rather, they were asked to decide a separation-of-powers issue: whether the president could unilaterally engage in such an action when Congress had not approved it. By refusing to intervene, the courts permitted the bombing to continue, involving a formerly neutral country in the war and creating the conditions for a genocidal military regime to gain power there. The courts justified their decisions by saying that if Congress felt the president was usurping its authority, it had institutional tools to address it, and the judiciary should not get involved until Congress had exhausted those methods. However, as Adler points out,

> It is true, of course, as the courts have held, that Congress has resources to draw upon in battle with the executive, among them the power of the pursue, the power to abolish programs and departments, investigatory authority, and the ultimate weapon, impeachment of the president for encroachment on its powers or for subversion of the Constitution. However formidable the weapons may appear to be, they are difficult to effectuate. Moreover, they require majorities and even a supermajority, in the event of impeachment, and thus will be unavailing to the ineffectual minority that seeks judicial protection. But is it the case that we really ought to prefer an interbranch conflict, with knives drawn and tempers frayed, to an impartial and dispassionate judicial resolution of competing constitutional claims? Or, to put it in other terms, is the nation well served by a Court that sits idly by in the face of a manifest constitutional violation?[11]

11. Ibid., 43.

The PQD is not limited to foreign policy, and the courts have invoked it to abstain from deciding domestic issues, such as the legitimacy of state governments[12] or congressional redistricting.[13] However, the PQD has figured more frequently in foreign than domestic policy cases because the courts have shown much greater deference to the discretionary actions of the political branches, especially the presidency, when they only affect persons outside the United States. Some scholars have claimed that the prudential PQD is "on the verge of dying, if not already dead,"[14] a relic of earlier times before the growth of judicial supremacy in the latter part of the twentieth century, but they usually include as a caveat that this is true "at least in cases not involving foreign affairs."[15]

Judicial abstention from foreign-policy matters is almost exclusively a twentieth century development, evolving as the United States took on an increasingly important role as a world power. As previously noted, earlier Supreme Courts did not abstain from deciding cases otherwise properly before them just because the decisions would impact foreign policy. According to Koh,

> [I]n Article III, the Framers created a federal judiciary and extended the judicial power of the United States to cases and controversies arising under treaties, affecting ambassadors and consuls, and involving foreign states, citizens, and subjects. As implemented by the first Congress in one of its first framework statutes, the Judiciary Act of 1789, these authorizations gave the Supreme Court (and such lower courts as Congress might create) an important checking function against the political branches with regard to a range of foreign matters.[16]

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12. Luther v. Borden, 48 U.S. 1, 47 (1849); Pacific States Telephone & Telegraph Co. v. Oregon, 223 U.S. 118 (1912).

13. *Colegrove,* 328 U.S. 549.

14. Barkow, "Rise and Fall of the Political Question Doctrine," 23.

15. Ibid., 36.

16. Koh, *National Security Constitution*, 76.

In a series of twentieth-century decisions, however, the Court reversed this historical understanding of its role in foreign policy. A major change in the Court's foreign-policy jurisprudence came with the decision in *United States v. Curtiss-Wright Export Co.*,[17] where the Court claimed that the Constitution gave almost unfettered power to the political branches to do as they pleased in foreign affairs. *Curtiss-Wright* primarily involved a separation-of-powers question—whether a particular congressional resolution "effects an invalid delegation of legislative power to the executive"[18]—but Justice Sutherland, writing for the majority, said that it would

> contribute to the elucidation of the question if we first consider the differences between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs…. The two classes of powers are different, both in respect of their origin and their nature. The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs.[19]

Justice Sutherland went on to outline, in sweeping language, a theory that eliminated almost any involvement by the judiciary in policing the separation of powers in foreign policy. It was not necessary, according to Sutherland, for the judiciary to do so because the limitations on the federal government in domestic affairs were based on considerations of federalism, and with no risk of the federal government's intruding on the rights of the states in foreign policy, the separation-of-powers concern was irrelevant. Adler notes about the decision,

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17. 299 U.S. 304 (1936).

18. *Id.* at 314.

19. *Id.* at 315–316.

> *Curtiss-Wright* … was a radical, path-breaking case. Despite the fact that it was a product of Justice Sutherland's imagination and that its rhetoric has been dismissed as "dictum," it has nevertheless enjoyed a long life—now more than fifty years—because the Court has trotted out [its doctrine] … whenever it has required a rationale to support a constitutionally doubtful presidential action in foreign affairs.[20]

Moreover, while the actual holding of *Curtiss-Wright* was limited and "nothing in *Curtiss-Wright* itself suggested that [all] executive actions in foreign affairs should be immune from judicial review … over time the *Curtiss-Wright* vision would mysteriously come to embrace [the] notion … that once courts have determined that foreign affairs are at stake, they should dismiss challenges to executive acts as political, not legal, questions."[21]

The idea that the Court's role in enforcing constitutional limitations on the federal government applied only to domestic and not foreign actions was raised again during World War II and the Korean War. During World War II, the foreign–domestic dichotomy broke down somewhat, but this was because the Court became overly deferential to the president's domestic constitutional violations, not because it was involving itself more in his foreign ones: as the nation found itself engaged in a total war, the Court abstained from interfering with domestic military actions that Roosevelt claimed were necessary for the war effort, even those that were constitutionally dubious.[22] However, as *Eisentrager* shows, the Court continued to use the difference between foreign and domestic actions of the U.S. government as a basis for abstaining

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20. Adler, "Court, Constitution, and Foreign Affairs," 26.

21. Koh, *National Security Constitution*, 95.

22. Specifically, the internment of American citizens of Japanese descent (see *Korematsu*, 323 U.S. 214) and the use of military tribunals to try spies captured and detained in the U.S., one of whom was a U.S. citizen (see *Ex parte Quirin*, 317 U.S. 1 [1942], discussed in Chapter V).

from questioning how the military acts abroad—even if it was similarly abstaining, under different guises, in domestic cases.

In the Korean War case *Youngstown Sheet and Tube Co. v. Sawyer*,[23] the domestic–foreign distinction became more pronounced. The Supreme Court never ruled against the president's decision to send troops abroad absent congressional approval, even though this was a violation of the Constitution's exclusive grant of war-making authority to Congress and went against many of the Court's own precedents.[24] However, when the congressionally unauthorized "police action" began affecting the rights of Americans domestically, the Court intervened. Attempting to avert a steel-worker strike that could hinder the war effort, President Truman had ordered his Secretary of Commerce, Charles Sawyer, to seize and operate several privately owned steel mills. The mill owners sued Sawyer to prevent the takeover, arguing that it exceeded the president's authority because the mill seizure had not been authorized by Congress, nor could he view a congressional declaration of war as a form of statutory authorization, since no such declaration existed. The Court found in favor of the steel mill owners. The "power … to take possession of private property to keep labor disputes from stopping production … is a job for the Nation's lawmakers, not for its military authorities,"[25] wrote Justice Black in the Opinion for the Court.

In a concurrence still frequently cited in separation-of-powers cases for its theory of presidential power, Justice Robert H. Jackson touched on the lack of congressional

23. 343 U.S. 579 (1952).

24. Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800); Talbot v. Seeman, 5 U.S. 1 (1801); Prize Cases, 67 U.S. 635 (1863).

25. *Youngstown*, 343 U.S. at 587.

authorization for the Korean War, but only insofar as the war was being used as an excuse to infringe the rights of Americans domestically; he pointedly refused to declare the president's actions abroad unconstitutional:

> Nothing in our Constitution is plainer than that declaration of a war is entrusted only to Congress. Of course, a state of war may in fact exist without a formal declaration. But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture. I do not, however, find it necessary or appropriate to consider the legal status of the Korean enterprise to discountenance argument based on it.[26]

Until the War on Terror, the courts in the twentieth century repeatedly abstained from intervening in most foreign policy decisions, even to enforce the separation of powers. Challenges to the Vietnam War,[27] Reagan's invasion of Granada,[28] covert CIA activities in Nicaragua,[29] and U.S. involvement in Yugoslavia[30] were all turned away by the lower courts based on the PQD or another abstention doctrine, and the Supreme Court exercised its discretion over its own docket and denied certiorari. However, the Supreme Court has never denied that there are some foreign policy issues that fall within its jurisdiction and that it could address if it so chose. As Justice Brennan observed,

> There are sweeping statements to the effect that all questions touching foreign relations are political questions. Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion

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26. *Youngstown*, 343 U.S. at 642–643 (Jackson, J., concurring).

27. Luftig v. McNamara, 252 F. Supp. 819 (D.D.C. 1966), *aff'd* 373 F.2d 664 (D.C. Cir. 1967).

28. Conyers v. Reagan, 578 F. Supp. 324 (D.D.C. 1984), *dismissed as moot*, 765 F.2d 1124 (D.C. Cir. 1985).

29. Sanchez-Espinoza v. Reagan, 568 F. Supp. 596 (D.D.C. 1982), *aff'd* 770 F.2d 202 (D.C. Cir. 1985).

30. Campbell v. Clinton, 52 F. Supp. 2d 34 (D.D.C. 1999), *aff'd* 204 F.3d 19 (D.C. Cir. 2000).

> demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views. Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.[31]

The question, therefore, is what is unique about the War on Terror—and, in particular, about the Guantanamo detainee habeas cases from the War on Terror—such that the Supreme Court has suddenly chosen to assert its prerogative to intervene in those types of foreign policy issues.

The Traditional War Paradigm

If the courts have been willing to tolerate greater flexibility with constitutional rights during times of war, it has been because of a particular understanding of what war entails and of the limits that a traditional type of war, by its very nature, imposes on presidential excesses.

Most important in this understanding is the idea that war is temporary, and any deviations from peacetime constitutional limitations will end when hostilities cease. As Corwin noted, "The American conception of war has always been that it is something arising outside of the normal course of events, something which is violently and arbitrarily projected across it, and which being removed, the normal course of events will resume its customary flow."[32] The courts are not so unrealistic as to expect that

31. *Baker*, 369 U.S. at 211–212.

32. Edward S. Corwin, *Total War and the Constitution* (New York: Alfred A. Knopf, 1947), 168.

peacetime constitutional norms will never have to be modified to meet the exigent circumstances of wartime.

> [T]he complex system of government of the democratic, constitutional state is essentially designed to function under normal, peaceful conditions, and is so often unequal to the exigencies of a great national crisis ... in time of crisis a democratic, constitutional government must be temporarily altered to whatever degree is necessary to overcome the peril and restore normal conditions.[33]

Nor have the courts denied that, oftentimes during war, they are institutionally ill equipped to question the political branches' determinations of military necessity. The judiciary, after all, does not want to place the country's military leaders in a position where they feel the need to disobey its orders to avoid disaster, nor does it want to be responsible if its orders are followed and they do result in catastrophe. But while the temporary relaxation of constitutional rights might be necessary and thus understandable, "there comes a time when this type of doctrine must be curtailed, or the Constitution be conceded to have been suspended."[34] At what point exactly the temporary accommodations turn into an indefinite alteration in the constitutional order is a question to which I will return in later chapters.

In addition to setting a temporal limit on the extension of governmental power, a traditional war demarcates the enemy to a significant extent based on nationality, allegiance to a foreign power, or presence on a battlefield. As the Supreme Court stated in *Hamdi*, "The capture and detention of lawful combatants … by universal agreement and practice [is an] important incident[] of war."[35] The aim of such wartime detention is

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33. Clinton Rossiter, *Constitutional Dictatorship* (Piscataway, NJ: Transaction Publishers, 2004), 5.

34. Corwin, *Total War*, 132n56.

35. *Hamdi*, 542 U.S. at 518. Internal quotation marks omitted.

not to punish but "to prevent captured individuals from … taking up arms once again."[36] The question that arises, though, is how to identify which individuals qualify as combatants who should be detained during hostilities. Presence on a battlefield, especially while in uniform, has always been a key indicator of combatant status. A battlefield also sets up some geographic limitation on the area where hostilities take place; although, especially in a "total war," hostilities can seep into other geographical areas in a country, and unlawful combatants may commit hostile acts outside the battlefield, the majority of fighting during a traditional war will take place between soldiers on the battlefield, allowing combatants to respect the "distinction between the armed forces and the peaceful populations of belligerent nations."[37]

During wartime, a U.S. law called the Alien Enemies Act[38] also allows the president the sweeping power to take into preventative detention any "alien enemies" who are residing within the United States. The relevant law defines an "alien enemy" not as a foreign national who is actually hostile toward the U.S. government, but as a national of a government with which the United States is at war, regardless of the individual's own personal views toward or actions against the United States. The theory behind this practice was explained by Justice Jackson in *Eisentrager*:

> The security and protection enjoyed [by a resident alien] while the nation of his allegiance remains in amity with the United States are greatly impaired when his nation takes up arms against us…. [D]isabilities this country lays upon the alien who becomes also an enemy are imposed temporarily as an incident of war ... [because the] alien enemy is bound by an allegiance which commits him to lose no opportunity to forward the cause of our enemy; hence the United States, assuming

36. *Id.*

37. *Ex parte Quirin*, 317 U.S. at 30–31.

38. 50 U.S.C. § 21. The policy of granting the president this wartime detention power dates back to the original Alien Enemies Act of 1798, 1 Stat. 577.

> him to be faithful to his allegiance, regards him as part of the enemy resources. It therefore takes measures to disable him from commission of hostile acts imputed as his intention because they are a duty to his sovereign.[39]

Jackson's guilt-by-association explanation is obviously extreme, attributing hostile intentions to individuals, many of whom are, no doubt, entirely peaceful and law abiding, based entirely on nationality, and justifying the imprisonment of many innocent people who have done nothing wrong. However, for Jackson and other defenders of this scheme, it represents an unfortunate yet defensible measure to deal with the unfortunate fact of war, for a variety of reasons. First, the Alien Enemies Act does not *mandate* the "summary arrest, internment and deportation"[40] of alien enemies; it merely says that the president will have the discretion to do so if he feels it necessary. By upholding the constitutionality of the Act,[41] the courts have not indicated that it is wise policy, but only that the civil liberty protections of the Constitution do not apply so strictly to noncitizens during a war with their country of citizenship as to prohibit Congress from choosing to enact such a policy. Second, as Jackson is careful to mention, such detentions are imposed only "temporarily," during the duration of hostilities, and they are done "as an incident of war and not as an incident of alienage."[42] Such an extreme measure is acceptable, under this view, because the category of people affected is closely circumscribed—it applies only to nationals of a country with which the United States is at war, not to all resident aliens—and it is a limited deviation from the United States'

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39. *Eisentrager,* 339 U.S. at 772–773.

40. *Id.* at 775.

41. See *Eisentrager,* 339 U.S. at 775 n.6 ("The courts, in an unbroken line of cases from … 1799 to … 1943, have asserted or assumed the validity of the Act and based numerous decisions upon the assumption.")

42. *Eisentrager,* 339 U.S. at 772.

normal treatment of legal resident foreign nationals, which during peacetime is on par with its respect for its own citizens. In times of peace, in fact, "the civil and property rights of immigrants or transients of foreign nationality so nearly approach equivalence to those of citizens [that] courts … have little occasion to inquire whether litigants before them are alien or citizen."[43] Finally, whatever else one may think about categorizing someone as a potential enemy based entirely on his nationality, "without regard to his individual sentiments or disposition,"[44] it makes the job of the courts easier: The courts' only responsibility in such cases, to avoid the prospect of an illegal or unconstitutional detention, is "to ascertain the existence of a state of war and whether [a detainee] is [in fact] an alien enemy."[45] The courts do not have to make the difficult determination of whether a foreign national is actually hostile toward the United States and would pose a threat to public safety or the war effort; that decision is left up to the executive.

The treatment of detainees is also an important factor in the judiciary's decision not to regularly involve itself in military detention policies, for historically the courts have not felt the need to intervene to protect military detainees from abuse. Historian Arnold Krammer notes that World War II was the first instance when the United States had to deal with large numbers of POWs:

> Among the last things of concern to the nation at that time were prisoners of war…. Moreover, there weren't any precedents. America had hardly any experience with POWs. When America entered World War I in April 1917, a handful of German ships were impounded and their crews placed in camps. Before that, American

43. *Id.* at 771.

44. *Id.* at 772.

45. *Id.* at 775.

> planners had nothing to learn from except Civil War horrors like Andersonville and Camp Grant.[46]

Nonetheless, according to Krammer, the Axis soldiers captured and housed by the United States during WWII "participate[d] in the best treatment of large numbers of enemy POWs in recorded history."[47] The Provost Marshal General's Office (PMGO) of the U.S. Department of War, charged with the responsibility of housing detained Axis soldiers for the duration of the war, displayed "almost religious adherence to the Geneva Accords of 1929."[48]

> The Geneva Convention required that the prisoners be accommodated with the same amenities as American soldiers—including military salaries—which including providing them with running water, laundry and bathing facilities, electricity and sufficient leisure time, as well as the ability to work for the host country on strictly nonmilitary tasks. The PMGO always leaned toward the most liberal interpretation of the regulations in order to insure the best protection for American POWs in German hands.[49]

It is therefore unsurprising that the WWII-era judicial precedents on detainees contain virtually no reference to the judiciary's importance in protecting captured soldiers from abuse, nor was there much role for the judiciary in ensuring that innocents were not imprisoned by mistake: because virtually all POWs held by the United States had been captured on the battlefield, while in uniform, it was clear that they were enemy

46. Arnold Krammer, *Prisoners of War: A Reference Handbook* (Westport, CT: Praeger Security International, 2008), 40.

47. Ibid.

48. Ibid., 47.

49. Ibid.

soldiers[50]—and, moreover, they were released following the cessation of hostilities (assuming they were not tried for committing war crimes).[51]

The Uniqueness of the War on Terror

In the aftermath of 9/11, Bush and others in his administration repeatedly stated that the terrorist attacks had forced America into a "war." As former Bush administration lawyer Jack Goldsmith has written,

> The administration's first and most fundamental post-9/11 decision occurred on September 11 itself. For decades the U.S. government had officially viewed terrorism as a law enforcement problem. But when Andrew Card told President Bush in a Sarasota elementary school on the morning of 9/11 that America was under attack, the President decided that the conflict with Islamist terrorism must be viewed as a war.[52]

But this was not just any war; it was a "new kind of war."[53] "[T]he war against terrorism," explained Bush in a 2002 memorandum to senior government officials, "ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of states. Our

50. One major instance of the off-battlefield capture of enemy forces was the apprehension of Nazi spies who had snuck into the United States to sabotage U.S. military installations. However, when captured, the spies did not try to cover up their allegiance or their intentions, preferring instead to plead for leniency or challenge the procedures used in their trials. See *Quirin*, 317 U.S. 1.

51. The military did, of course, notoriously abuse its detention power during World War II, but the main victims were not captured Axis soldiers but rather Japanese-American citizens subjected to internment.

52. Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (New York: W.W. Norton & Company, 2009), 102–103.

53. Memorandum from White House Counsel Alberto R. Gonzales to President George W. Bush. *Decision Re Application of the Geneva Conventions on Prisoners of War to the Conflict with Al Qaeda and the Taliban* (Jan. 25, 2002), http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf [hereinafter Gonzales Jan. 25, 2002 Memo].

Nation recognizes that this new paradigm—ushered in not by us, but by terrorists—requires new thinking in the law of war."[54]

It is true that the "war on terror" does not resemble a traditional war between nation-states. But does it represent a new phenomenon in American history? The United States has faced terrorist attacks before, but never viewed them as a military issue. In the late nineteenth and early twentieth centuries, anarchist violence became a worldwide phenomenon. The United States experienced several deadly public bombings and even the assassination of its president by an anarchist. Of course, the threat from dynamite-wielding anarchists pales in comparison to that posed by modern-day terrorists. However, the anarchists still set off a public panic. Historian Richard Jensen notes, "Contemporary writers referred to the explosive power of dynamite in apocalyptic terms comparable to those used by [J. Robert] Oppenheimer to describe the first atomic bomb."[55] President Theodore Roosevelt averred, "When compared with the suppression of anarchy, every other question sinks into insignificance."[56] Nonetheless, the perpetrators of such violent acts as the Haymarket bombing were arrested by the police and tried in civilian court by a jury,[57] as was President McKinley's assassin.[58] The notorious Palmer Raids, which were

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54. Memorandum from President George W. Bush to senior government officials. *Humane Treatment of al Qaeda and Taliban Detainees* (Feb. 7, 2002), http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf [hereinafter Bush Feb. 7, 2002 Memo].

55. Richard Bach Jensen, "The Evolution of Anarchist Terrorism in Europe and the United Stated from the Nineteenth Century to World War I," in *Terror: From Tyrannicide to Terrorism* ed. Brett Bowden and Michael T. Davis (Queensland, Australia: University of Queensland Press, 2009), 104.

56. Quoted in Jensen, "Evolution of Anarchist Terrorism," 155.

57. See James Green, *Death in the Haymarket: A Story of Chicago, The First Labor Movement, and the Bombing that Divided Gilded Age America* (New York: Random House, 2006), 247ff.

58. President William McKinley was shot to death in 1901 by anarchist Leon Czolgosz. See Isaac Cronin, ed., *Confronting Fear: A History of Terrorism* (New York: Thunder's Mouth Press, 2002), 22–32.

directed at suspected communists even though anarchists were responsible for the bombs that provoked Attorney General A. Mitchell Palmer to engage in mass arrests, took place through the use (and abuse) of the federal criminal justice system, not the military.[59] This analogy is imperfect in that the United States fought anarchist violence only domestically, whereas the War on Terror is being fought globally, which necessarily implicates the military. However, the limited U.S. reaction to anarchism reflects a policy decision (and perhaps the limitations of its military ability at the time), not the more-limited scope of the anarchist problem as compared to Islamic terrorism. According to Jensen, "By the early twentieth century, anarchist terrorism appeared to be a universal threat, like al-Qaeda today, with real or alleged anarchist assassinations and bombings occurring on nearly every continent."[60] Anarchist violence became so bad throughout Europe that many of the major powers signed protocols and treaties to share intelligence and cooperate with each other's policing efforts.[61] Yet when invited to sign on to the anti-anarchist protocols, the United States declined, preferring to limit its fight against terrorism to domestic law-enforcement efforts.[62]

The War on Terror is also not unprecedented insofar as it is, at least partly, an armed conflict against a "non-state actor." In fact, defenders of treating the War on Terror as a

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59. Daniel Patrick Moynihan, *Secrecy: The American Experience* (New Haven, CT: Yale University Press, 1998), 115; R.G. Brown et al*., To the American People: Report upon the Illegal Practices of the United States Department of Justice* (Washington, DC: National Popular Government League, 1920). Jensen ("Evolution of Anarchist Terrorism," 106) points out that Italy and Spain did resort to heavy-handed military action against anarchists, including the use of military tribunals, detentions without trial, and torture. However, such techniques failed to produce any gains over regular intelligence-gathering and police work, and ended up merely "blacken[ing] the reputations of the governments involved."

60. Jensen, "Evolution of Anarchist Terrorism,"104.

61. Ibid., 92ff.

62. Ibid., 98.

military conflict rather than a law-enforcement problem themselves point to the numerous examples of such conflicts in American history as justification for using this framework:

> War is not … something only sovereign states do. International law recognizes that "armed conflicts," as modern wars are called, can take place between nations and non-state actors. American history is replete with presidents exercising full military powers with non-state actors such as pirates, the Chinese boxers, and Pancho Villa.[63]

As the examples cited above show, cases of armed conflicts against non-state actors go back to the founding of the country over two centuries ago—hardly a new paradigm in the modern age. In fact, one of the earliest armed conflicts in American history was between the United States and the Barbary powers, whose forces "terrorized" American merchant ships in the Mediterranean and "took hostages for ransom and slavery,"[64] resulting in a "series of conflicts" that were "remarkably parallel"[65] to today's War on Terror. The so-called Barbary Wars "presented [enemy] identification issues similar to those faced in the War on Terror,"[66] as U.S. forces fought against "an enemy which had not yet been fully identified or defined."[67] Yet in that "conflict against stateless enemies of indefinite status who repeatedly violated international laws and customs, the United States maintained its adherence to recognized international laws and customs"; treated captured pirates humanely, as prisoners of war; and gave the crew of each captured ship

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63. Goldsmith, *Terror Presidency*, 103–104.

64. Brief of legal historians Lawrence M. Friedman, Jonathan Lurie, and Alfred P. Rubin as Amici Curiae Supporting Petitioner, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (04-5393), 2006 WL 53971, at *4.

65. *Id.* at 1.

66. *Id.* at 6 (capitalization altered).

67. *Id.*

the "opportunity to contest the capture in court."[68] Given that the Founders themselves "showed extraordinary deference to standard military detention and adjudication procedures … during a similarly open-ended and irregular conflict,"[69] the claim that the War on Terror is historically unprecedented and thus requires "new thinking in the law of war"[70] is founded upon a mistaken premise.

This is not meant to suggest that the danger posed by contemporary terrorists, with potential access to weapons of mass destruction (WMDs) or nuclear "dirty bombs," is comparable to that presented by terrorists in earlier times. It could perhaps be argued that the *level* of danger presented by contemporary terrorists makes the current conflict unique. However, this is a far cry from the claims made by defenders of the new-kind-of-war view that what differentiates the War on Terror from previous conflicts are the nature of the conflict (a state versus a non-state actor), the nature of the enemy (militants who hide among, and are difficult to distinguish from, civilians), and the nature of the enemy's tactics (attacks against civilians rather than military or political targets). If there is anything particularly unique about the War on Terror, in fact, it is not any of these factors but, rather, the response of the Bush administration in claiming the right, in the name of fighting a "war," to sweep aside virtually all legal restrictions on presidential power. As journalist Jane Mayer aptly summarized it,

> Wars have always aggrandized presidential power in America's history. Some of the country's greatest presidents, including Abraham Lincoln and Franklin Roosevelt, trampled civil liberties in the name of safeguarding national security. Lincoln infamously suspended habeas corpus during the Civil War. Roosevelt interned

68. *Id.* at 12.

69. *Id.* at 3.

70. Bush Feb. 7, 2002 Memo.

> 120,000 Japanese-American citizens. By comparison, President Bush's infringements of Americans' civil liberties during the war on terror have been modest. But the constitutional arguments made by Bush Administration lawyers in justifying its policies have been of a whole new order. While earlier presidents arguably overstepped boundaries in times of emergency, neither Lincoln nor Roosevelt claimed the routine presidential right to do so…. The Bush White House, in contrast, seized on historical aberrations, such as the darkest moments of Lincoln and Roosevelt, and turned them into a doctrine of presidential prerogative.[71]

The new legal powers claimed by the Bush administration were laid out in a series of memoranda by the Office of Legal Counsel (OLC) of the Justice Department and the White House General Counsel's office. "The nature of the new war," according to then-White House counsel Alberto Gonzales, "renders obsolete" many of the traditional protections afforded to captured combatants under the law of war, such as the Geneva Conventions.[72] "[C]riminal provisions such as the prohibitions against assault, maiming … and torture" do not "apply to the President's detention and interrogation of enemy combatants pursuant to his Commander-in-Chief authority" because "Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield," wrote Deputy Assistant Attorney General John Yoo.[73] During the war, "the President may deploy military force domestically and to prevent and deter similar terrorist attacks," notwithstanding the restrictions on the domestic use of the military in the Posse Comitatus Act,[74] wrote Yoo and Department of Justice Special Counsel

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71. Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned Into a War on American Ideals* (New York: Anchor Books, 2009), 47.

72. Gonzales Jan. 25, 2002 Memo.

73. Memorandum from Deputy Assistant Attorney General John Yoo to William J. Haynes II, General Counsel of the Department of Defense. *Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States* (Mar. 14, 2003), at 13, http://www.aclu.org/pdfs/safefree/yoo_army_ torture_memo.pdf [hereinafter "Yoo Mar. 14, 2003 Memo"].

74. 18 U.S.C. § 1385.

Robert J. Delahunty.[75] Yoo similarly argued that the president has "constitutional authority as Commander in Chief" to order the seizure and indefinite "detention of United States citizens as enemy belligerents by the U.S. Armed Forces," based on the president's own determination of belligerency, and without any of the usual due process given to suspected criminals and seemingly required by the Fifth, Sixth, and Seventh Amendments of the Constitution.[76]

Although some of these claims were later repudiated by the Bush or Obama administrations, the right to detain suspected al Qaeda affiliates indefinitely is one that has been consistently asserted and defended in court. As discussed in the Conclusion, the Obama administration's legal rationale is similar to the Bush administration's claim that the United States is involved in a "war" and a "traditional wartime authority … [is] the power to detain captured enemy soldiers, without charge or trial, until the conflict is over."[77]

Armed Conflict and the Law of War

No doubt, the United States is involved in an armed conflict with al Qaeda, but not every armed conflict amounts to a "war," or at least one of the type and magnitude that would give the president the legal power to detain suspected enemies of the United States, without trial, as long as he or she sees fit. The United States has engaged in dozens of

75. Memorandum from Deputy Assistant Attorney General John Yoo and Special Counsel Robert J. Delahunty to Alberto R. Gonzales, Counsel to the President. *Re: Authority for Use of Military Force to Combat Terrorist Activities within the United States* (Oct. 23, 2001), http://www.justice.gov/opa/documents/memomilitaryforcecombatus10232001.pdf.

76. Memorandum from Deputy Assistant Attorney General John Yoo to Assistant Attorney General Daniel J. Bryant. *Re: Applicability of 18 U.S.C. §4001(a) to Military Detention of United States Citizens* (June 27, 2002), http://www.justice.gov/opa/documents/memodetentionuscitizens06272002.pdf.

77. Goldsmith, *Terror Presidency*, 106.

armed conflicts with both state and non-state actors since its founding, but, as historian Arthur Schlesinger, Jr., notes, the majority of these were minor skirmishes, and putting them in the same category as actual wars "wildly overstate[s] the quality of most of these incidents," which "were all local [and] mostly brief."[78]

> Military action against Indians—stateless and lawless by American definition—pirates, slave traders, smugglers, cattle rustlers, frontier ruffians or foreign brigands was plainly something different from warfare against organized governments. It differed both in the juridical status of the combatants under international law and in the practical fact that such fugitive hostilities *would not lead to full-scale war*.[79]

In a letter to President Obama, a group of former government officials and experts in the law of war pointed out that the president's use of the military to capture terrorists does not mean that the United States is engaged in a "war" against those individuals, nor does it mean that they automatically fall into the category of combatants who can, under the traditional "law of war" be detained without trial until the cessation of hostilities:

> The President may certainly employ military personnel outside areas of actual armed conflict abroad to track down and capture persons suspected of planning, engaging or assisting in … criminal terrorist acts. But any suspect apprehended in those operations may be imprisoned only after charge and trial under the criminal laws. The military is no more authorized to incarcerate a terrorist suspect captured in Bosnia or England or Canada until the end of the "war on terror" than it would be to incarcerate a suspected drug dealer captured in Bogota or Mexico until the end of the "war on drugs." If the suspicions against them are correct, these people are criminals and should be prosecuted as such.[80]

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78. Arthur M. Schlesinger, Jr., *The Imperial Presidency* (New York: Houghton Mifflin, 2004), 53–54.

79. Ibid., 50 (emphasis added).

80. Letter from David M. Brahms et al. to President Barack Obama. *Re: The Adequacy of Our Existing Laws and Institutions to Deal with the Threat of Terrorism* (June 8, 2009) at 3. https://web.archive.org/web/20130701151007/http://washingtonindependent.com/wp-content/uploads/2009/07/Obama-detention-letter.pdf.

The law of war,[81] as codified in such international agreements as the Hague and Geneva Conventions, provides a normative framework for considering the rights and duties of both combatants and states in the War on Terror. Many of the recent discussions about the applicability of the law of war to the "War on Terror" have focused on technical legal questions, such as whether international conventions are judicially enforceable[82] and whether the War on Terror represents a single conflict against a non-state entity, al Qaeda, or a combination of distinct conflicts against al Qaeda and against state entities such as the former Taliban government in Afghanistan. In focusing on such legalistic distinctions, these debates miss the broader importance of the law of war: it is intended to provide a lens through which to consider the moral and political implications of armed conflict and the potential consequences of concluding *inter arma silent leges.* The law of war encompasses generally accepted principles designed to prevent human rights abuses incident to armed conflict, and to provide a foundation on which it could be argued that some actions, even in times of war, are morally wrong.[83] As Justice Jackson noted, in the Western legal and philosophical tradition, "We have never been able to accept as an ultimate principle the doctrine that, in vital matters of war and peace, each

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81. The "law of war" is generally viewed as encompassing both written treaties, such as the Geneva and Hague Conventions, and "customary international law," a body of generally accepted norms about the proper conduct of war. Although it includes customs, treaties, and precedents on the acceptable reasons to declare war (*jus ad bellum*), it largely consists of the humanitarian law delineating acceptable wartime practices and the proper treatment of populations affected by the fighting (*jus in bello*). See Ingrid Detter, *The Law of War*, 2nd ed. (New York: Cambridge University Press, 2000), esp. 151–168; Gregory P. Noone, "The History and Evolution of the Law of War Prior to World War II," *Naval Law Review* 47 (2000), 176–207.

82. See footnote 50 in Chapter II.

83. For a general criticism of the "realist" argument that "war lies beyond (or beneath) moral judgment," see Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 3rd ed. (New York: Basic Books, 2000), 3ff.

sovereign power must be free of all restraint except the will and conscience of its transitory rulers."[84]

Perhaps the best indication of the usefulness of the law-of-war framework in analyzing the United States' recent actions is that the United States took the lead in developing the international framework of treaties, conventions, and legal precedents that form the basis for the modern law of war. In the aftermath of World War II, the United States led the prosecutions at Nuremberg, which established the idea of international tribunals to try perpetrators of aggressive wars, war crimes, and crimes against humanity. Even more importantly, Nuremberg stood for the proposition that even accused war criminals being tried in a military tribunal deserve basic judicial protections such as the presumption of innocence and the assistance of counsel:

> To free [accused Nazi war criminals] without a trial would mock the dead and make cynics of the living.... But undiscriminating executions or punishments without definite findings of guilt, fairly arrived at, would violate pledges repeatedly given, and would not sit easily on the American conscience or be remembered by our children with pride. The only other course is to determine the innocence or guilt of the accused after a hearing as dispassionate as the times and horrors we deal with will permit, and upon a record that will leave our reasons and motives clear.[85]

The United States participated in the drafting of the 1949 Geneva Conventions, which amended the earlier 1929 conventions to include new protections for civilians (the Fourth Geneva Convention) and for individuals involved in armed conflicts that do not resemble traditional inter-state wars (Common Article 3[86]). The United States has also

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84. Robert H. Jackson, "The Challenge of International Lawlessness," *American Bar Association Journal* 27, no. 11 (1941): 691.

85. Robert H. Jackson, *Report to the President on Atrocities and War Crimes,* June 7, 1945, http://avalon.law.yale.edu/imt/imt_jack01.asp. As noted in the next chapter, not everyone believed the military trials of Axis members accused of war crimes lived up to these lofty ideals.

86. Common Article 3, "Conflicts not of an International Character," appears in all four Geneva Conventions to emphasize its universal applicability to all persons implicated in that type of conflict. See

signed and ratified additional international treaties that apply to the treatment of captured combatants during times of armed conflict, including the International Covenant on Civil and Political Rights (ICCPR)[87] and the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT).[88] The U.S. Army Field Manual on the Law of Land Warfare reflects the understanding of the armed forces that the "law of war is binding"[89] on the United States in all armed conflicts and that the law of war includes both formal treaties such as the Geneva Conventions and "unwritten or customary law [that] is firmly established by the custom of nations."[90] In both previous conflicts and the current War on Terror, the United States has called upon its enemies to respect the law of war in its treatment of captured U.S. soldiers and civilians. Indeed, one of the ironies of the Bush administration's conduct in the War on Terror was that it argued that the Guantanamo detainees did not deserve prisoner of war (POW) protections because Al Qaeda and the Taliban did not adhere to the law of war, while at the same time claiming not to be bound by the law of war in its own treatment of those detainees.

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention) art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention) art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Third Geneva Convention) art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Geneva Convention Relative to the Treatment of Prisoners of War (Fourth Geneva Convention) art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. See also footnote 93 in this chapter.

87. *Entered into force* Mar. 23, 1976, 999 U.N.T.S. 171.

88. Dec. 10, 1984, 1465 U.N.T.S. 85.

89. United States Army, *Field Manual 27-10: The Law of Land Warfare* (Washington, DC: Government Printing Office, 1956) at 4, http://www.loc.gov/rr/frd/Military_Law/pdf/law_warfare-1956.pdf.

90. *Id.*

As previously mentioned, some have argued that international treaties on the law of war are outdated because the War on Terror "is not the traditional clash between nations adhering to the laws of war that formed the backdrop"[91] of international treaties such as the Geneva Conventions. However, international treaties include provisions for armed conflicts between a state and a non-state actor. They also recognize the existence of combatants who fail to abide by the law of war (those the Bush administration called "unlawful enemy combatants," though that term is not recognized in international law). What they do not permit is, as the Bush administration did, creating a new category of detainees ("unlawful enemy combatants") who are covered by neither the rules pertaining to combatants nor those pertaining to civilians:

> Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third [Geneva] Convention, a civilian covered by the Fourth [Geneva] Convention, or … a member of the medical personnel of the armed forces who is covered by the First [Geneva] Convention. There is no intermediate status; nobody in enemy hands can be outside the law.[92]

Without going into all of the legal technicalities of international humanitarian law, it is worth looking at how treaties such as the Geneva Conventions divide up protections to those affected by armed conflicts based on the type of conflict and the status of those involved. The Geneva Conventions separate conflicts into two categories: traditional wars between nation-states ("international" conflicts), and "armed conflicts not of an international character," that is, between a nation and armed non-state actors such as

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91. Gonzales Jan. 25, 2002 Memo at 2.

92. International Committee of the Red Cross, *Commentary on the Fourth Geneva Convention* at 51, http://www.icrc.org/IHL.nsf/COM/380-600007?OpenDocument (emphasis omitted). It should be noted that "'[c]ivilian" is a term of art in the law of war, not signifying an innocent person, but rather someone in a certain legal category who is *not* subject to *military* seizure or detention. So, too, a 'combatant' is by no means always a wrongdoer, but rather a member of a different 'legal category' who *is* subject to *military* seizure and detention." *al-Marri v. Pucciarelli,* 534 F.3d 213, 228 n.11 (4th Cir. 2007) (emphasis in original).

rebels or terrorists.[93] Soldiers in an international conflict are either combatants abiding by the law of war, who qualify for the full set of POW protections in the Third Geneva Convention, or combatants violating the law of war, who consequently fail to qualify for POW status (i.e., "unlawful combatants"). The latter group not only can be detained for the duration of a conflict, but can also be tried and punished for violating the law of war. However, even though such combatants do not qualify under the Third Geneva Convention for the full set of POW protections, they are still protected from mistreatment by a more minimal set of rights guaranteed by the Fourth Geneva Convention.[94]

Belligerents in a "conflict not of an international character" are protected by Common Article 3 of the Geneva Conventions; they do not qualify for POW status because armed non-state actors are not considered combatants at all, but rather criminals subject to prosecution for violating the domestic laws of the country in which they are fighting. As the International Committee for the Red Cross has noted, "In non-international armed conflict combatant status does not exist."[95] Unlike the POW protections of the Third Geneva Convention, which are designed to ensure proper treatment during detention for the duration of conflict—after which point POWs are to be released and repatriated—Common Article 3 is intended to ensure humane treatment and

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93. Common Article 3 states that it applies "[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties" (*supra* note 86 in this chapter). As the Supreme Court noted in *Hamdan*, "The term 'conflict not of an international character' is used … in contradistinction to a conflict between nations" (548 U.S. at 630), not to indicate a conflict that remains geographically in a single country.

94. In addition to civilians, the Fourth Geneva Convention covers all individuals not covered by one of the other three Geneva Conventions "who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." Fourth Geneva Convention, at art. 4.

95. International Committee of the Red Cross, "The Relevance of IHL [International Humanitarian Law] in the Context of Terrorism," last modified January 1, 2011, http://www.icrc.org/eng/resources/documents/misc/terrorism-ihl-210705.htm.

fair judicial procedures for individuals who, it is anticipated, will be prosecuted for crimes or released soon after capture if they are found not to have committed any crimes.

The corollary of the denial of official "combatant" status to detained belligerents in non-international conflicts is that the law of war does not permit their indefinite detention without trial for the duration of the conflict.[96] This might seem to deprive states of an important tool for combating armed groups such as terrorists, but it simply means that any detention of such individuals must take place pursuant to (or pending) a trial, through which they are either convicted of a crime under the state's domestic laws or freed. It is important to remember, as previously mentioned, that international law allows for the detention of lawful combatants for the duration of a conflict to prevent their returning to the battlefield, not to punish them. Such detention has to be without trial because there is nothing to try them for: "it is no crime to be a soldier."[97] By contrast, it *is* considered a crime to participate in armed insurrection, rebellion, or terrorist attacks. In fact, the reason why the law of war does not recognize combatant status in non-international armed conflicts is because lawful combatants are not allowed to be tried for fighting, whereas "[s]tates are not willing to grant members of armed opposition groups immunity

96. If the Bush administration had classified the wars in Afghanistan and Iraq as traditional wars between nation-states (albeit part of the "global War on Terror"), the U.S. government would, under the law of war, be justified in detaining Taliban soldiers and Iraqi insurgents without trial for the duration of hostilities in each country. Of course, the Bush administration made no such argument (nor has the Obama administration) because it would require viewing those fighting against U.S. troops in Afghanistan and Iraq as potentially lawful combatants rather than terrorists. In a traditional war between governments, "fighting back is a *legitimate* response to the enemy…. [And] because fighting back is legitimate, in [a traditional] war the enemy soldier deserves special regard once he is rendered harmless through injury or surrender. It is impermissible to punish him for his role in fighting the war." David Luban, "The War on Terrorism and the End of Human Rights," in *The Constitution in Wartime: Beyond Alarmism and Complacency* ed. Mark Tushnet (Durham, NC: Duke University Press, 2005), 220. Soldiers can still be punished if they violate the law of war (e.g., for fighting without wearing uniforms to distinguish themselves from civilians), but the Third Geneva Convention requires that all captured soldiers be treated as POWs until adjudged otherwise by a "competent tribunal." Third Geneva Convention, at art. 5.

97. *Eisentrager*, 339 U.S. at 793 (Black, J., dissenting).

from prosecution under domestic law for taking up arms."[98] The United States expressed such opposition in refusing to sign the 1977 Additional Protocols to the Geneva Conventions on the grounds that, in extending the provisions regulating interstate conflicts to include certain types of conflicts between a state and non-state actors, the Protocols would undermine the traditional distinction between true combatants, who qualify for POW status, and noncombatants engaged in violence, who do not.[99] But noncombatants engaged in violence are not categorically excluded from the law of war; they are only excluded from the POW protections. They are still guaranteed certain basic rights, such as those against torture and unfair trials. The idea promoted by some Bush administration members that suspected terrorists, because they do not qualify for POW status under the Third Geneva Convention, have no rights whatsoever under international law,[100] does not accord with either the Geneva Conventions or other sources of international law, such as the ICCPR and the UNCAT.

Article 9 of the ICCPR, a central piece of international human rights law that the United States has ratified, specifically addresses the concern that governments, especially during times of armed conflict, might be tempted to engage in detention without legal process—the same concern that motivated the development of habeas corpus in Anglo-American law that will be discussed in the next chapter. Article 9 begins, "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in

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98. International Committee of the Red Cross, "Relevance of IHL."

99. See *New York Times*, "Denied: A Shield for Terrorists," February 17, 1987, http://www.nytimes.com/1987/02/17/opinion/denied-a-shield-for-terrorists.html; Goldsmith, *Terror Presidency*, 110–115.

100. See, e.g., Goldsmith, *Terror Presidency*, 110–115.

accordance with such procedure as are established by law."[101] The Article states that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."[102] The scope of this provision is notable, as other parts of Article 9 apply only to individuals "arrested or detained on a *criminal* charge,"[103] and grant them a greater set of rights. In contrast, this provision applies to anyone at all "deprived of his liberty," which encompasses both arrests pursuant to criminal law and governmental detention that is not authorized by any law (again, the type of injustice that, in Anglo-American legal systems, the writ of habeas corpus is designed to redress).

In sum, the law of war fully takes into account that there will be armed conflicts between groups other than nation-states. It also takes into account that a party to a conflict may not abide by the law of war. Neither factor is reason enough for the other parties to declare the law of war irrelevant or void. The law of war permits the United States to capture suspected terrorists abroad with its military and to try suspected terrorists, either in domestic court or in military tribunals, for crimes including violating the law of war by killing civilians in terrorist attacks. However, even suspected terrorists are granted certain minimal rights, including the right to basic judicial protections in trial and to freedom from arbitrary and indefinite imprisonment without trial. These

101. ICCPR art. 9(1), *supra* note 87 in this chapter.

102. *Id.* at art. 9(4).

103. *Id.* at art. 9(3) (emphasis added).

protections are especially important during a nontraditional war in which innocent civilians may be confused with suspected terrorists and mistakenly captured as enemies.

Judicial Intervention in the War on Terror

Had the Bush administration adhered to the United States' traditional practice of respecting the rights guaranteed to captives under international humanitarian and human rights law, the Supreme Court may never have gotten involved. Instead, the Bush administration stated that it could detain indefinitely, without trial, any noncitizen it suspected of being associated with al Qaeda.[104] It refused to recognize the detainees as prisoners of war entitled to the protections of the Third Geneva Convention, and human rights groups and the U.S. media began recounting stories of abuse and harsh conditions at Guantanamo.[105] In addition, toward the beginning of 2004, the Abu Ghraib scandal broke, undermining claims by the Bush administration that it was treating detainees humanely despite the lack of judicial oversight.

As the next three chapters document, the Supreme Court responded to these concerns by modifying a longstanding tool at its disposal to challenge executive overreaching: the writ of habeas corpus.

104. See "Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 Fed. Reg. 57833 (2001).

105. Amy Waldman, "Guantanamo and Jailers: Mixed Review by Detainees," *New York Times*, March 17, 2004, A6; Patrick E. Tyler, "Ex-Guantanamo Detainee Charges Beating," *New York Times*, March 12, 2004, A10; Human Rights Watch, *World Report 2003*, http://www.hrw.org/legacy/wr2k3/.

Chapter IV: The Evolution of Habeas Corpus in U.S. History

In Chapter II, I looked at how the Supreme Court's relationship with the other branches of government has changed as a result of the aggressive efforts of the Warren, Burger, and Rehnquist Courts to promote judicial supremacy. In the previous chapter, I discussed the changing relationship in the context of foreign policy. Developments in this relationship have been particularly important for how the Court has used the writ of habeas corpus as a tool to check executive overreaching. Contrary to the claims of those who see *Boumediene* as an anomaly—a distortion of the Court's traditional habeas authority or its jurisdictional doctrines[1]—I argue in the next three chapters that the Court has frequently adjusted its habeas practices (and related jurisdictional doctrines) to take into account historical and political developments that could impede its authority to challenge unjust detentions. *Boumediene* is therefore not an irregularity, but a continuation of the Court's longstanding practice. Understanding this dimension of the Court's jurisprudence requires looking at the history and evolution of the writ, starting with its origins in England. I should emphasize that my goal in this and the next chapter is not to provide a comprehensive history of the writ of habeas corpus in American law; rather, it is to highlight how it has changed over time and to explain the major cases—especially the World War II–era habeas petitions from Axis soldiers and supporters—that form the backdrop against which the War on Terror cases were decided.

1. See, e.g., Heather P. Scribner, "A Fundamental Misconception of Separation of Powers: *Boumediene v. Bush*," *Texas Review of Law and Politics* 14, no. 1 (2010): 90–162.

The "Original Meaning" of the Suspension Clause

The brief text of the Suspension Clause lends itself to multiple interpretations—and significant confusion among legal authorities about what exactly constitutes "suspension." The Clause states, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[2] Yet nowhere does the Constitution set out who is entitled to this "privilege," who gets to do the suspending, or what exactly constitutes a "suspension." Two questions in particular are important to understanding the debates surrounding the *Eisentrager* and *Boumediene* decisions. First, is the clause meant as a guarantee of a federal right to habeas corpus—that is, a right to petition for the writ in *federal* court? Second, does the Supreme Court—the only federal court established by the Constitution—have an inherent authority, perhaps deriving from common law, to issue the writ, or is its ability to do so dependent on statutory authorization?

An obvious source of bewilderment about the Clause is that it addresses the issue of suspension of the writ without any affirmative guarantee that the writ exists in the first place. The Clause, in other words, never explicitly ensures that there is a writ that could be suspended. Although modern scholars disagree on exactly why the Clause is framed as it is, there is a general consensus that many judicial debates about the meaning of the Clause fail to recognize a key historical point: in the early republic, federal courts were not the only authority to issue writs challenging detention by the federal executive, as "even after the establishment of the federal judiciary, the state courts … retained power

2. U.S. Const. art. I, § 9, cl. 2.

to issue habeas corpus for federal prisoners."[3] This arrangement remained in place until the mid-nineteenth century,[4] when the Supreme Court ended it, declaring that the "distinct and independent character of the government of the United States, from that of the government of the several States"[5] made it incumbent on the states not to "intrude within the jurisdiction" of the federal judiciary by hearing habeas cases.[6] The Court paid lip service to the idea that the dichotomy would work both ways—the federal judiciary

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3. Duker, *Constitutional History of Habeas Corpus*, 128. See also Rex A. Collings, Jr., "Habeas Corpus for Convict—Constitutional Right or Legislative Grace?" *California Law Review* 40, no. 3 (19552): 335–361.

4. In *Ableman v. Booth*, 62 U.S. 506 (1858), the Court held that state courts could not issue habeas writs challenging federal imprisonment for a criminal conviction. In *In Re Tarble,* 80 U.S. 397 (1871), the Court extended the prohibition of state-court-issued habeas writs to include challenges to any action by the federal government, not just postconviction imprisonment. See Collings, "Habeas Corpus for Convicts," 345.

5. *Tarble*, 80 U.S. at 406.

6. Although the Court claimed it was ending state-court habeas for federal prisoners in order to uphold principles of federalism, the charged political atmosphere likely had more to do with it: In two separate cases, the Court saw its authority and supremacy undermined by a state court through the latter's use of habeas corpus. In *Ableman*, decided only two years before the Civil War began, the Wisconsin Supreme Court had issued a writ of habeas corpus to free a prisoner convicted of violating the Fugitive Slave Act, which it held to be unconstitutional. When Chief Justice Taney "saw [his] decision [in *Dred Scott*] being resisted through interference with the Fugitive Slave Act" (Duker, *Constitutional History of Habeas Corpus*, 151), he reversed the Wisconsin Supreme Court's decision by declaring that it, a state court, had no right to intervene in a case of a prisoner being held by federal authorities. "No State judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or to require him to be brought before them" because they "know that the prisoner is within the dominion and jurisdiction of another Government, and that neither the writ of habeas corpus, nor any other process issued under State authority, can pass over the line of division between the two sovereignties" (*Ableman*, 62 U.S. at 524). Thirteen years later, when the Wisconsin Supreme Court heard another petition for a writ of habeas corpus on behalf of an individual held by federal authorities, it refused to follow the *Booth* holding. Against *Booth*'s claim that the Constitution prohibited state courts from issuing the writ of habeas corpus to federal prisoners, the Wisconsin court argued that when the Constitution was drafted, "The full power and jurisdiction to issue [the writ of habeas corpus] was … a part of the undoubted sovereignty of the states," and it had subsequently "been asserted and exercised by most of the state tribunals, with little serious question, until" the *Booth* decision (*In re Tarble*, 25 Wisc. 390, 395 (1870)). *Booth* had been incorrectly decided, the Wisconsin court asserted, because the "public and judicial mind of the country was then in such a peculiar state" over the issue of slavery that the Supreme Court "failed to perceive distinctly the real theory upon which this court had assumed the right to pass collaterally upon the validity of a judgment even of a federal court." (*Id*. at 407). However, the Supreme Court was not persuaded, and in *In Re Tarble*, it categorically reaffirmed Taney's reasoning, in the process making clear that the prohibition on state-court habeas proceedings extended not only to federal prisoners, but to anyone held by federal officials.

was, for the most part, not supposed to involve itself in purely state affairs such as criminal imprisonment under state law—but it recognized that the because federal law and the Constitution bound state governments, but not vice versa, and because it was the prerogative of the federal judiciary to ensure compliance with federal law and the Constitution, the federal courts would at times need to "intrude with its judicial process into the domain of the [states] … to preserve its rightful supremacy in cases of conflict of authority."[7] As discussed below, after the Civil War, legislative developments gave the Court explicit authority to intervene to hear cases from state prisoners who claimed their treatment violated the Constitution. The stage was therefore set for a second development that now obscures the original role of state courts in American habeas jurisprudence: as "statutory authority [for the federal judiciary] to issue the writ broadened well beyond the common law conception,"[8] the American practice of habeas corpus drifted away from the original purpose of habeas—challenging executive detentions that were illegal or extralegal, usually because the executive refused to litigate the case—to become primarily "a means of *re*litigation"[9] of state criminal proceedings in federal court.

Some habeas scholars have argued that the proceedings of the Constitutional Convention show that the Framers did not see a need to constitutionally guarantee a federal habeas writ—that is, one issued by a federal court—because the states would maintain the power to issue writs challenging federal detentions. William Duker, for

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7. *Tarble*, 80 U.S. at 407.

8. Richard H. Fallon, Jr., Daniel J. Meltzer, & David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System*, 5th ed. (New York: Thomson-West, 2003), 1291 (emphasis removed). This change is discussed further below.

9. Ibid., 1291; see also 1285 ("Postconviction relief, although not the original office of habeas corpus, has become its primary contemporary use").

instance, has argued that the Suspension Clause "was meant to restrict Congress from suspending *state* habeas for federal prisoners except in certain cases where essential for public safety."[10] According to Duker, "The framers of the Constitution did not intend to guarantee a right to a federal writ. Under the intent of the framers any right to federal habeas would be purely statutory."[11] However, "[p]olitical struggles between the departments of the national government and shifting notions of federalism have transformed the meaning of the clause so that today it is generally interpreted as somehow guaranteeing a federal writ."[12] Other historians have argued that, notwithstanding the availability of state habeas for federal prisoners, the Framers intended the Clause to ensure the existence of a federal habeas writ, which the Framers believed the Supreme Court (and other federal courts) had an inherent common-law power to issue. Eric Freedman, for example, asserts that "all parties [at the Constitutional Convention] read [the Suspension Clause] as protecting broadly against Congressional interference with the power that federal and state courts were each assumed to possess: to order the release on habeas corpus of both federal and state prisoners."[13] For the present purposes, it is important merely to note that both sides of this debate agree that the

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10. Duker, *Constitutional History of Habeas Corpus*, 155.

11. *Id*.

12. Duker, *Constitutional History of Habeas Corpus*, 8. See also Collings, "Habeas Corpus," 344–345 ("It is unlikely that the Framers viewed the clause as establishing a federal right to habeas corpus…. Perhaps the First Congress thought the states had sufficiently provided for the writ, that protection would be unnecessary in the new Constitution other than against arbitrary suspension. This view draws support from subsequent history.")

13. Eric M. Freedman, "Just Because John Marshall Said it, Doesn't Make it So: *Ex Parte Bollman* and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789," *Alabama Law Review* 51 (2000): 558. See also Francis Paschal, "The Constitution and Habeas Corpus," *Duke Law Journal* 1970 (1970): 607 ("[I]n the case of habeas corpus congressional authorization is not essential [because the Suspension Clause] is a direction to all superior courts of record, state as well as federal, to make the habeas privilege routinely available.")

general intention of the Framers in instituting the Suspension Clause was to guarantee that habeas would "be available to all [federal] prisoners in *some* forum."[14] Regardless of whether it was a federal or state court, some judicial entity would possess the authority to judge the legality of all federal detentions and, if unjustified, order release.

The existence of the state courts as a source of habeas for federal prisoners may explain why the Suspension Clause is framed in negative terms, as a prohibition on suspension rather than a guarantee of the writ's existence: because the writ was already being issued by state courts relying on state- and common-law guarantees of the writ, the Framers may have thought that all they needed to do to protect the writ for federal prisoners was prevent interference with the state court proceedings (i.e., through a federal suspension bill). Alternatively, the negative phrasing may indicate that the Framers saw it as obvious that federal courts would have an inherent common-law power to issue the writ. Either way, the Framers did not think that an explicit grant of habeas jurisdiction to the federal courts was necessary to protect the availability of the writ for federal prisoners. As Freedman states, "[A]ll parties [to the Constitutional Convention] agreed that the text as written adequately safeguarded a cherished right and that no further protection was required in the Bill of Rights."[15] And that is the central concern in understanding how the Suspension Clause was originally viewed. The essence of the Clause is not a delineation of the practical workings of habeas—such as who has jurisdiction to issue the writ—but rather an emphatic declaration that the writ to

14. Vladeck, "Suspension Clause as a Structural Right," 284.

15. Freedman, "Just Because John Marshall Said it," 547.

challenge executive detention will be available, from some judicial source, under all but the most extreme circumstances.

That the Framers did or did not believe the Clause guaranteed certain powers to the federal judiciary in their time does not settle the issue of what the Clause demands today, as legal developments over the last two centuries may have made it so that the realization of the Clause's main mandate—the availability of habeas in some forum—requires a different conception of the power that the Clause confers on the federal judiciary. For instance, Duker may be right that the Clause was originally intended only to address the practice of state habeas for federal prisoners and had nothing to do with the federal judiciary's authority to issue the writ, but the Framers no doubt would have felt otherwise about the federal judiciary's power (if that is, indeed, an accurate depiction of their perspective) had state courts during their time lost the ability to issue the writ to federal prisoners—as occurred a century later.

Bollman and the Issue of Jurisdiction

The foregoing discussion indicates the difficulty not only with ascertaining the original meaning of the Suspension Clause but also with applying its central dictates to a judicial system that has changed dramatically since the country's founding. Adding to this problem, the Court early on adopted an interpretation of its habeas powers under Article III and the Suspension Clause that reflected a major break from the practices of common-law courts in England.

In Section 14 of the Judiciary Act of 1789, Congress established the lower federal courts and announced that both they and the Supreme Court "shall have power to issue

writs of … *habeas corpus*."[16] This legislation—the precursor to the modern-day federal habeas statute discussed at length in the next chapter—would seem to make moot any concerns that the Constitution did not sufficiently guarantee the Court's authority to issue the writ, but the constitutionality of Section 14 came into question in the aftermath of *Marbury v. Madison*.

Article III of the Constitution gives the Supreme Court "original jurisdiction" over "all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party," and "appellate jurisdiction" over all other judicial matters, subject to "such Exceptions, and under such Regulations as the Congress shall make."[17] In *Marbury*, Chief Justice Marshall struck down a congressional attempt to increase the Court's "original jurisdiction" beyond those instances enumerated in Article III. "[T]he plain import" of Article III, he said, was "that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original";[18] the difference between the two types of cases could not be ignored, and the Court could not exercise one type of jurisdiction when the Constitution mandated the other.

The denial of Congress's ability to increase the Court's original jurisdiction was an essential element in Marshall's creative and politically savvy *Marbury* argument, through which he extricated the Court from "what seemed a painful and uncompromising

16. 1 Stat. 73, § 14 (1789).

17. Exceptions Clause, U.S. Constitution, Article III, § 2. The extent of congressional control over the Court under the Exceptions Clause is discussed in Henry M. Hart, "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic," *Harvard Law Review* 66, no. 8 (1953): 1362–1402; and Laurence Claus, "The One Court that Congress Cannot Take Away: Singularity, Supremacy, and Article III," *Georgetown Law Journal* 96 (2007): 59–121.

18. *Marbury*, 5 U.S. at 175.

dilemma"[19] and "managed to empower his branch even as he backed away from a fight with a new and popular President."[20] However, it presented a problem for the Court's ability to respond to habeas petitions it received.[21] Because habeas cases virtually never involved public ministers and consuls, the Court could not claim "original jurisdiction" under the Constitution to hear them, and *Marbury* suggested that Congress's attempt to legislate such jurisdiction to the Court through the 1789 Judiciary Act was unconstitutional.

One way out of this dilemma would have been for the Court to assert an inherent common-law right to respond to habeas petitions, much as the common-law courts in England did. Marshall, however, did not believe that any of the branches of the federal government, including the Court, could exercise power not delegated to it in the Constitution. Although habeas may be rooted in the common law, U.S. federal courts are not common-law courts, but "courts which are created by written law, and whose jurisdiction is defined by written law," he claimed.[22] Consequently, "the power to award the writ by any of the courts of the United States, must be given by written law."[23]

Marshall was not, though, willing to let the Court lose such an important power to

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19. Robert G. McCloskey, *The American Supreme Court*, 4th ed. (Chicago: University of Chicago Press, 2005), 26.

20. Akhil Reed Amar, "*Marbury*, Section 13, and the Original Jurisdiction of the Supreme Court," *University of Chicago Law Review* 56, no. 2 (1989): 462. This is not to say that the *Marbury* holding was correct; cf. Mark Graber, "Establishing Judicial Review: *Marbury* and the Judicial Act of 1789," *Tulsa Law Review* 38, no. 4 (2003): 609–650.

21. I am here referring to the Court's ability to hear original habeas petitions—those that are filed directly with the Court rather than reaching it through appeal from a lower court (see footnote 26 in Chapter IV). The *Marbury* holding would not prevent the Court from continuing to hear habeas cases on appeal, as the *Bollman* decision shows.

22. *Ex Parte Bollman*, 8 U.S. 75, 93 (1807).

23. *Id.* at 93–94.

check the political branches.[24] To preserve its ability to issue the writ, Marshall held, in *Ex Parte Bollman*, that when the Supreme Court responded to a habeas petition, it was effectively hearing an "appeal" from someone who claimed to be unjustly imprisoned: "The decision that the individual shall be imprisoned must always precede the application for a writ of habeas corpus, and this writ must always be for the purpose of revising that decision."[25] Thus, the Court's issuance of habeas writs was, according to Marshall, virtually always an exercise of *appellate* jurisdiction,[26] one which Congress had, in accordance with its Exceptions Clause powers, specifically granted to the Court in the Judiciary Act of 1789.

Much like *Marbury*, *Bollman* reconciled seemingly conflicting goals, but through questionable reasoning and legal claims.[27] More important for the present discussion, Marshall's reasoning set up a tension between the Suspension Clause and the Exceptions Clause. If Congress has the authority under the Exceptions Clause to limit the Court's appellate jurisdiction, and if habeas is an appellate practice, then Congress should be able

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24. There were also political reasons why Marshall wanted to be able to issue the writ in the *Bollman* case. See Freedman, "Just Because John Marshall Said it," 558ff.

25. *Bollman,* 8 U.S. at 101.

26. However, writs issued in response to petitions directed to the Supreme Court, rather than reaching the Supreme Court through appeal, are still referred to as "original" writs from the Court, even though they are purportedly being issued under the Court's appellate jurisdiction. See Dallin H. Oaks,"'The 'Original' Writ of Habeas Corpus in the Supreme Court," *Supreme Court Review* 1962 (1962): 153–211.

27. Modern commentators have been especially critical of Marshall's assertion that the Court could not issue the writ absent statutory authorization. Francis Paschal noted, "To the argument that all superior courts of record had a common law habeas jurisdiction…. Marshall curtly rejoined that there was a distinction between courts originating in the common law and courts created by statute, and that 'as the reasoning has been repeatedly given by this court,' the matter would not be pursued further. Where this reasoning had been given Marshall was not able to say, not because he had no time to collect the citations, but because there were none to collect." Paschal, "Constitution and Habeas Corpus," 25. Rather, Freedman argued, "Marshall's statement that courts created by written law could only exercise the powers explicitly granted by such laws was simply an *ipse dixit* conveniently brought forth for the occasion" ("Just Because John Marshall Said it," 586) and one that, according to Duker, "conflict[s] with both the history and clear wording of the [Suspension] [C]lause" (*Constitutional History of Habeas Corpus*, 140).

to revoke the grant of habeas power in the Judiciary Act of 1789. But, if this grant of power is necessary to ensure the availability of habeas for federal prisoners, then the Suspension Clause would appear to prevent Congress from altering its own legislation.

Marshall may not have seen this as a concern because, at the time of *Bollman*, the third premise was not true—federal prisoners could petition for habeas from state courts, so the failure of Congress to confer habeas jurisdiction to federal courts "would not have raised substantial Suspension Clause concerns."[28] As mentioned previously, the Court prohibited state-court issuance of federal writs in two Civil War–era cases, throwing into stark relief the conflict between the Suspension Clause and the Exceptions Clause under Marshall's *Bollman* reasoning. Once habeas for federal detainees and prisoners became

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28. Vladeck, "Suspension Clause as a Structural Right," 279. Vladeck believes that *Bollman* has become "anachronistic [because it was] written during a time when the absence of federal jurisdiction would not have meaningfully implicated the availability of habeas corpus in some forum." *Id*. The problem with this interpretation is that it relies on the premise that Marshall did not think habeas needed to be available in the federal courts because it was available in state courts. However, dicta in *Bollman* suggests that Marshall might have believed that the Suspension Clause required habeas to be available in federal court. In his analysis of the Judiciary Act of 1789 in *Bollman*, Marshall included the following aside:

> It may be worthy of remark, that the act was passed by the first congress of the United States, sitting under a constitution which had declared "that the privilege of the writ of *habeas corpus* should not be suspended, unless when, in cases of rebellion or invasion, the public safety might require it." Acting under the immediate influence of this injunction, they [*sic*] must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they give, to all the courts, the power of awarding writs of *habeas corpus*. *Bollman*, 8 U.S. at 95.

What Marshall meant by this vague reference to Congress's "obligation" has been the source of much debate. One interpretation is that it shows that Marshall believed that the Suspension Clause *required* Congress to legislate habeas authority to the federal judiciary (the "obligation theory": see Duker, *Constitutional History of Habeas Corpus*, 137). Only recently, for instance, Justice Stevens wrote in an opinion for the Court that "Marshall's comment expresses the … view that the Clause was intended to preclude any possibility that 'the privilege itself would be lost' by either the inaction or the action of Congress" *St. Cyr*, 533 U.S. at 304–305 n.24. Under such a reading, the Clause is a mandate that the federal courts have habeas jurisdiction, even if the Clause itself does not explicitly lay out the source of this jurisdiction. Ironically, others, such as Justice Scalia, have seized upon the same language to argue that Marshall held the opposite view: that the Suspension Clause is not a positive guarantee of a federal writ because it required congressional action to give it "life and activity," and "without *legislated* habeas jurisdiction the Suspension Clause would have no effect." *St. Cyr,* 533 U.S. at 340 (Scalia, J., dissenting) (emphasis in original); see footnote 55 in this chapter for a fuller discussion of Scalia's interpretation of the Suspension Clause.

available only in federal court, the question arose whether the Suspension Clause places limits on subsequent Congresses' power to alter or amend the First Congress's grant of habeas jurisdiction to the courts in the 1789 Judiciary Act. Generally, Congress is free to revoke or amend its prior legislation, and future Congresses are not bound to keep in place legislation passed by previous Congresses. Moreover, the Exceptions Clause specifically grants Congress the power over the Court's appellate jurisdiction. The Suspension Clause, though, may place the Court's habeas jurisdiction in a privileged position relative to other statutory grants of jurisdiction.

For most of its history, the Court did not have to address this conflict or other shortcomings of the *Bollman* holding: rarely have the federal courts found themselves lacking the necessary statutory grant of jurisdiction to hear a habeas case (or unable to gain that jurisdiction through creative statutory interpretation). To the contrary, as the Court itself has observed, "the general spirit and genius of our institutions has tended to the widening and enlarging of the *habeas corpus* jurisdiction of the courts and judges of the United States."[29] Rather than restricting the type of habeas cases the Court can hear, most congressional revisions of the federal habeas statute in U.S. history have had the opposite effect, expanding the jurisdiction of the federal courts to hear new types of cases from new classes of prisoners.[30] Revisions in 1833 and 1842 extended the federal courts' jurisdiction to cover federal officials and foreign nationals, respectively, detained by state officials,[31] but the most momentous change came with the Habeas Corpus Act of 1867.

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29. *Ex Parte Yerger*, 75 U.S. 85, 102 (1868).

30. See Duker, *Constitutional History of Habeas Corpus*, 181–211.

31. Justin J. Wert, *Habeas Corpus in America: The Politics of Individual Rights* (Lawrence, KS: University of Kansas Press, 2011), 45–50.

The Act of 1867 stated that federal courts, "in addition to the authority already conferred by law, shall have the power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the [C]onstitution, or of any treaty or law of the United States."[32] Although the bill was motivated by concerns that federal courts would be powerless to help former slaves, or those still held in slavery,[33] the expansive language gave federal courts authority to hear habeas suits from virtually anyone claiming to be illegally or unconstitutionally imprisoned in the United States. The Supreme Court had ruled in 1844 that the federal habeas corpus statute did not give federal courts the power to hear challenges from those imprisoned through state criminal proceedings,[34] but the 1867 revisions to the habeas statute changed that.[35] This power was briefly eliminated because of concerns about how it would affect Reconstruction, but reestablished in 1885.[36] From that point forward, federal habeas would become overwhelmingly concerned with hearing collateral attacks from state prisoners.

Disputes subsequent to *Bollman* about the statutory basis for the federal judiciary's exercise of habeas jurisdiction have mainly focused on the broadened scope of habeas due to the 1867 changes, leaving unchallenged the authority of the federal courts to hear traditional common-law-type habeas challenges to executive detention. For instance, in

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32. 14 Stat. 385 (1867), ch. 28.

33. Wiecek, *Birth of the Modern Constitution*, 344.

34. *Ex Parte Dorr*, 44 U.S. 103 (1845). As noted, there was an exception: Congress had amended the federal habeas statute in 1833 and 1842 to cover federal officials and foreign nationals, respectively, detained by state officials.

35. Curtis R. Reitz, "Federal Habeas Corpus: Postconviction Remedy for State Prisoners," *University of Pennsylvania Law Review* 108, no. 4 (1960): 461n1.

36. Wiecek, *Birth of the Modern Constitution*, 346.

the 1868 case *Ex Parte McCardle,* the Court addressed its authority to hear a case that was brought before it under the Habeas Corpus Act of 1867.[37] Congress, not wanting the case—which involved a challenge to one of the Reconstruction Acts—to go before the Court, revoked the extension of jurisdiction in the 1867 Act in what was later called the "McCardle repealer." The Court upheld Congress's authority to curtail the Court's new habeas jurisdiction, recognizing, as it did in *Bollman,* that Congress's "power to make exceptions to the appellate jurisdiction of this court is given by express words" in the Constitution, and "[w]ithout jurisdiction the court cannot proceed at all in any case."[38] However, while the Court dismissed McCardle's case for want of jurisdiction, it noted that it had not lost its ability to hear all habeas cases. "The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867. It does not affect the jurisdiction which was previously exercised"[39] under the original Judiciary Act of 1789. When the Court soon thereafter heard a habeas appeal brought under the jurisdiction of the earlier Judiciary Act, it asserted its right to hear the case and issue the writ.[40] (And as noted earlier, the "McCardle repealer" was reversed in 1885.[41])

Likewise, none of the congressional changes to the federal habeas statute in the early and mid-twentieth century attempted to affect the judiciary's ability to hear common-law-type habeas cases. Instead, both congressional action and Court decisions focused on the

37. Duker, *Constitutional History of Habeas Corpus*, 189ff.

38. *Ex Parte McCardle*, 74 U.S. 506, 514 (1868). See also Duker, *Constitutional History of Habeas Corpus*, 194–196.

39. *McCardle*, 74 U.S. at 515.

40. *Yerger*, 75 U.S. 85.

41. Wiecek, *Birth of the Modern Constitution*, 346.

federal courts' newfound jurisdiction to hear challenges to state criminal cases. Changes to the federal habeas statute in 1947, 1950, and 1966 attempted to streamline the process for hearing cases by loosening geographic restrictions on which district courts could hear petitions.[42] Recognizing that it was not usually necessary for a prisoner to be physically present in court for his or her attorney to plead the case, Congress also permitted courts to hear habeas cases without needing to physically "bring the body" to the hearing.[43]

The Supreme Court itself was largely responsible for the increase in the federal courts' habeas caseload in the decades following the passage of the 1867 revisions to the habeas statute. Interpreting those changes, the Court over time gave an increasing scope to the grounds upon which state prisoners could bring federal habeas claims. From 1895 to 1953, "The scope of federal habeas corpus for state prisoners … evolved from a quite limited inquiry into whether the committing state court had jurisdiction … to whether the applicant had been given an adequate opportunity in state court to raise his constitutional claims … and finally to actual redetermination in federal court of state court rulings on a wide variety of constitutional contentions."[44] By vastly broadening the constitutional protections afforded to criminal suspects,[45] the Warren Court increased the federal courts' habeas caseload even further, since habeas became a prime vehicle for prisoners to ask

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42. The changes brought about by these amendments are discussed in *United States v. Hayman,* 342 U.S. 205, 211–224 (1952), and *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 496–500 (1973). The latter two amendments are what led the Court in *Braden* to reverse its holding in *Ahrens v. Clark,* 335 U.S. 188 (1948), that had set strict geographic limitations on where habeas cases could be heard. See the discussion in Chapter VI, pages 170–173.

43. See *Hayman*, 342 U.S. at 211–224; *Braden*, 410 U.S. at 496-500.

44. *Schneckloth v. Bustamonte*, 412 U.S. 218, 255–256 (1973) (Powell, J., concurring).

45. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Escobedo v. Illinois,* 378 U.S. 478 (1964), broadening the Sixth Amendment right to counsel; and *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Malloy v. Hogan*, 378 U.S. 1 (1964), broadening the Fifth Amendment protection against compelled self-incrimination.

federal courts to vindicate due-process rights.[46]

By the late 1960s, it became clear that the lower federal courts were overburdened from hearing habeas suits based on state-court criminal cases. These were all cases that had already been litigated in and upheld by state courts, leading many jurists to question whether such extensive federal oversight was necessary. As one federal judge commented,

> The proverbial man from Mars would surely think we must consider our system of criminal justice terribly bad if we are willing to tolerate such efforts at undoing judgments of conviction…. His astonishment would grow when we told him that the one thing almost never suggested on collateral attack is that the prisoner was innocent of the crime. His surprise would mount when he learned that collateral attack on a criminal conviction by a court of general jurisdiction is almost unknown in the country that gave us the writ of habeas corpus and has been long admired for its fair treatment of accused persons.[47]

By the late 1960s, "Congress and the Burger Court [were] work[ing] together in some instances to restrict the writ."[48] However, the restrictions focused exclusively on federal-court oversight of state criminal cases. The goal was not to undermine the rights of prisoners (although some dissenting justices thought it would have that effect)[49]; rather, it was to prevent suits from being duplicated at the state and federal levels, especially if there was no basis for their claims, and to lessen the workload of the federal courts by insisting that constitutional claims should first be raised in, and adjudicated by, state courts. Importantly, none of the statutory or doctrinal changes curtailed the federal

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46. See the discussion in Neil McFeeley, "Habeas Corpus and Due Process: From Warren to Burger," *Baylor Law Review* 28 (1976): 537–548.

47. Henry J. Friendly, "Collateral Attacks on Criminal Judgments," *University of Chicago Law Review* 38, no. 1 (1970): 145.

48. McFeeley, "Habeas Corpus and Due Process," 548.

49. See, e.g., *Stone v. Powell*, 428 U.S. 465, 503 (1976) (Brennan, J., dissenting) ("Today's holding portends substantial evisceration of federal habeas corpus jurisdiction").

judiciary's ability to hear habeas cases that would have been covered by the grant of jurisdiction in the 1789 Judiciary Act.

That changed in the mid-1990s, when the newly elected Republican Congress decided to make substantial changes to both the federal habeas statute and federal immigration law, one of which was to narrow the availability of habeas corpus to immigrants who were seeking to challenge deportation orders. Had this happened in the nineteenth or early twentieth century, the Court may not have had the political capital to assert its right to enforce the Suspension Clause in the face of congressional opposition. However, by the time the Court was forced to address this issue in 2001, it was confident enough of its own institutional authority to claim that the Suspension Clause placed real limits on Congress's ability to undermine the core of the Court's habeas jurisdiction.

St. Cyr and the Silent Overruling of *Bollman*

Two laws passed by Congress in 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA)[50] and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)[51] severely curtailed the federal judiciary's jurisdiction over habeas suits. The AEDPA significantly restricted the jurisdiction of federal courts to hear collateral attacks from state-court prisoners, and there were concerns, at first, that these changes would affect the Court's authority to issue "original writs," thus potentially violating the Suspension Clause. However, in keeping with its doctrine of constitutional avoidance, when it heard its first challenge to the AEDPA, the Supreme Court interpreted the

50. 110 Stat. 1214 (1996).

51. 110 Stat. 3009 (1996).

changes only to "affect the standards governing the granting of [habeas] relief," not its jurisdiction to hear those cases.[52] A unanimous Court therefore held that there was no Suspension Clause concern and Congress was properly utilizing its Exceptions Clause power.

The Court could not escape the Suspension Clause question so easily when it heard *INS v. St. Cyr*, a 2001 case challenging the restrictions on the availability of habeas for challenging deportation actions by the Immigration and Naturalization Services (INS). Because the INS was an executive agency, the Supreme Court saw its detention of illegal immigrants pending deportation as a form of executive imprisonment that would fall under the common-law-type habeas challenge to executive imprisonment. Although much of *St. Cyr* dealt with how the INS was applying the amendments to pending deportees, the Court also had to address whether the new restrictions on habeas availability to deportees in federal custody violated the Suspension Clause.

While the Court did not attempt to provide a comprehensive analysis of the Suspension Clause—and, in fact, referenced the difficulty of determining exactly what the Clause requires as "in and of itself a reason"[53] to avoid doing so—it held that, "at the absolute minimum, the Suspension Clause protects the writ as it existed in 1789,"[54] when Congress passed the first Judiciary Act. In other words, while Congress could amend the federal habeas statute to go beyond the scope of the common-law writ in 1789, as it has done repeatedly throughout U.S. history, and it could later revoke those extensions, as the

52. *Felkin v. Turpin,* 518 U.S. 651, 653 (1996).

53. *St. Cyr*, 533 U.S. at 301n13.

54. *Id*. at 301 (internal quotation marks omitted).

Court held it could do in *Ex Parte McCardle,* it could not restrict the writ to exclude categories of people or types of cases that have traditionally been covered by the common-law writ. The Suspension Clause sets a floor to the federal habeas statute and trumps the Exceptions Clause's general grant of power to Congress over the Court's appellate jurisdiction.

The *St. Cyr* decision produced the strange result that Congress was not free to amend at will a federal statute passed by an earlier Congress. However, this outcome was clearly preferable to the alternatives: either outright repudiate *Bollman*, a 200-year-old precedent that has been upheld several times and was written by the most famous and respected justice in the history of the Court, or hold that the Suspension Clause places no real limit on Congress's ability to take away the Court's habeas jurisdiction. Avoiding both these shortcomings, the *St. Cyr* majority opinion instead claimed to be following *Bollman* but, by taking away congressional control over the Court's habeas jurisdiction, effectively overturned it *sub silentio. Bollman*, after all, stood for the proposition that the federal judiciary did not have inherent jurisdiction to issue habeas writs and could only get that jurisdiction through congressional authorization. By limiting Congress's ability to amend the federal habeas statute, the Court circumvented the question of inherent jurisdiction but accomplished the same end: giving the Court the authority to issue habeas writs regardless of whether Congress wanted it to have that power. [55]

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55. In a bizarre dissent, Justice Scalia demonstrated the difficulty of upholding *Bollman* without undercutting either the Suspension Clause or Exceptions Clause. Disagreeing with the majority's holding that limited the scope of the Exceptions Clause when it came to congressional control of the Court's habeas jurisdiction, Justice Scalia ended up making an argument that effectively rendered the Suspension Clause meaningless. Scalia noted that a "straightforward reading of [the Suspension Clause] text discloses that it does not guarantee any content to (or even the existence of) the writ of habeas corpus, but merely provides that the writ shall not (except in case of rebellion or invasion) be suspended."33 U.S. at 337. Of course, this is technically correct, but, as discussed above, the reason for this phrasing can only be properly understood when one looks at the availability of habeas at the time the Clause was drafted. Ignoring the historical

The historical evidence suggests that this is precisely what the Framers intended when they put the Suspension Clause in the Constitution. The Framers knew "that the common-law writ all too often had been insufficient to guard against the abuse of monarchial power"[56] because in Britain, "habeas relief often was … suspended by Parliament … in times of political unrest, to the anguish of the imprisoned and the outrage of those in sympathy with them."[57] The British experience with habeas "counseled the necessity for specific language in the Constitution to secure the writ and ensure its place in our legal system."[58] *Bollman* reflected not the intentions of the Framers but Justice Marshall's own views of the limitations of the judiciary to act contrary to the wishes of Congress. By the time of *St. Cyr* in 2001, the Court had gained sufficient institutional credibility and standing to back away from Marshall's claims and assert that the Constitution empowered it in ways that did not require congressional

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context entirely—both that federal prisoners in the late eighteenth century could rely on state courts for habeas relief and that the drafters of the Clause, writing prior to *Bollman*, may have thought that the federal judiciary would have common-law authority to issue the writ—Scalia concluded that the Clause "fail[s] affirmatively to guarantee a right to habeas corpus." *Id.* What, then, according to Scalia, is the purpose of the Suspension Clause? To explain why the Framers would have cared enough to prohibit suspension of the writ while not valuing habeas so much as to protect its existence in the first place, Scalia resorted to redefining what constitutes "suspension." According to Scalia, "To 'suspend' the writ was not to fail to enact it, much less to refuse to accord it particular conten t… [but rather to] temporarily but entirely eliminat[e] the 'Privilege of the Writ' for a certain geographic area or areas, or for a certain class or classes of individuals." *Id*. at 337–338. Under this reading of the Suspension Clause, all the Clause prohibits is Congress's *temporarily* eliminating the writ or limiting its scope; as long as it permanently does so, it is not violating the Suspension Clause.

This reading of the Clause may be textually plausible, but it makes no logical sense. If Congress is free to permanently revoke its statutory authorization of the writ, it can easily effect a temporary suspension by passing legislation that ostensibly eliminates the writ for good, only to later pass new legislation reestablishing the writ. The Suspension Clause, in other words, would accomplish nothing. Even if one puts aside the historical evidence about the importance of the writ to the Framers and their views about what the Suspension Clause was intended to accomplish, it is hard to imagine why those writing the Constitution would include in it a limitation on congressional power that Congress could so easily circumvent.

56. *Boumediene*, 553 U.S. at 739–740.

57. *Id.* at 741.

58. *Id.* at 740.

assent. Arguably, there is a whole host of powers that the Court requires to function as an effective coordinate branch of the federal government, but, as it recently pointed out, "few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the executive to imprison a person."[59]

59. *Id.* at 797.

Chapter V: Habeas Corpus in the World War II Era

By hearing a petition for a writ of habeas corpus from someone in federal detention, the judiciary is putting itself in the position of challenging the president's determination that an individual merits imprisonment. In cases such as *Boumediene* that address whether federal legislation violates the Suspension Clause, the judiciary potentially has to stand up to Congress. In both instances, the Court's standing vis-à-vis the elected branches will influence whether it has the institutional power (and motivation) to accomplish its goal of using the writ of habeas corpus to ensure civil liberty, or whether its pronouncements will fall on deaf ears.

The judiciary's habeas jurisprudence during wartime has reflected this limitation on its actual power. During the Civil War, for instance, after Lincoln issued a proclamation suspending the writ of habeas corpus, Chief Justice Roger Taney issued a habeas writ to free a federal prisoner after finding that only Congress, not the president, could constitutionally suspend the writ.[1] But in a dejected tone, Taney noted his realization that his decision would have no practical effect in the face of a president who refused to acquiesce: "In such a case, my duty was too plain to be mistaken. I have exercised all the power which the constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome."[2] Likewise, when the full Supreme Court was first presented with a challenge to the president's power to try civilians by military commission, it used dubious jurisdictional claims to avoid having to consider the case while hostilities were ongoing, recognizing that the judiciary risked further damage to its

1. *Merryman*, 17 F. Cas. 144.

2. *Merryman,* 17 F. Cas. at 153.

institutional legitimacy if it issued further opinions that were ignored by the president.[3] Only after the fighting had stopped was the Court willing to make its famous pronouncement in *Ex Parte Milligan* that the president lacked the power to try civilians in military proceedings when the federal "courts were all open [and] their processes had not been interrupted."[4]

As discussed in Chapter II, the Court's institutional and political capital could not have been more different during World War II and the War on Terror. In contrast to the weakness of the Court during World War II, by the turn of the twenty-first century, following almost a half century of repeated judicial involvement in politically charged issues and the Court's nullification of legions of laws it viewed as unconstitutional, few questioned its ability to intervene in the War on Terror if it so chose. Its habeas jurisprudence reflected this newfound prerogative, especially, as discussed in the previous chapter, when for the first time in U.S. history it faced attempts by Congress to significantly impede the judiciary's jurisdiction over traditional, common-law-type habeas challenges to executive detention.

During and immediately following World War II, several German and Japanese detainees attempted to use the writ of habeas corpus to challenge their trials by military commission and the subsequent punishments meted out, including years of imprisonment

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3. Ex Parte Vallandigham, 68 U.S. 243 (1863). The Court claimed that it had no authority to intervene to free those convicted by military commission because both its certiorari and habeas powers were exercises of appellate jurisdiction, which only applied to courts created pursuant to the Constitution or congressional legislation, whereas the Civil War–era military commissions were part of a separate system recognized by customary international law to try "military offences" that are not outlawed by statute and therefore "must be tried and punished under the common law of war." *Id.* at 249. The Court made it clear that it did have jurisdiction over military courts established by Congress, such as courts martial, and, with the introduction of the first Articles of War in 1916, military commissions were brought under statutory regulation, thus greatly diminishing *Vallandigham*'s precedential value.

4. *Milligan,* 71 U.S. at 29.

or the death penalty. Because these cases provide many of the precedents that the Court revisited and amended during the War on Terror, it is worthwhile to analyze some of them in depth, in particular, four whose holdings seemed directly implicated in deciding the Guantanamo habeas cases: *Ex Parte Quirin*, *Hirota v. MacArthur*, *In re Yamashita*, and, most importantly, *Johnson v. Eisentrager*.

In *Ex Parte Quirin,*[5] decided less than eight months after the United States was plunged into World War II by the attack on Pearl Harbor, the Court refused to grant habeas relief to a group of Nazi spies who had snuck into the country to commit sabotage and were subsequently captured, tried, and sentenced to death by a special military court ordered by the president. The Court unanimously rejected the claim of the spies, one of whom was an American citizen, that *Ex Parte Milligan* prohibited the president from trying them in military tribunals when the civil courts were open and that the president's orders for the military court violated the rules Congress had prescribed for military trials in the Articles of War,[6] the predecessor to the modern-day Uniform Code of Military Justice. Following the cessation of hostilities, the Court heard three additional habeas challenges to the military tribunals set up to try Nazis accused of violating the law of war. In 1946, in *In Re Yamashita,* the Court refused to overturn the conviction of a Japanese general sentenced to death for failing to prevent soldiers under his command from committing war crimes.[7] In the 1949 case of *Hirota v. MacArthur*, the Court refused to hear a habeas challenge to an Allied military tribunal in Japan, claiming a lack of

5. 317 U.S. 1.

6. 10 U.S.C. §801 *et seq*.

7. 327 U.S. 1.

jurisdiction.[8] Finally, in the 1950 *Eisentrager* decision, the Court, frustrated that it was still continuing to receive habeas petitions from Japanese and German prisoners, extricated itself from any involvement in U.S. detention policies abroad by disclaiming jurisdiction over all habeas petitions from noncitizens outside the United States.[9]

The historical evidence suggests that the Court, in these cases, was not acting as a neutral arbiter. For many of the justices, the very idea of hearing habeas appeals from sworn enemies of the United States was repugnant, even if the petitions presented legitimate concerns about presidential overreaching and violations of the constitutional separation of powers. The Court was willing to resort to very questionable legal arguments and claims about the limitations of its authority to avoid having to hold any of the president's actions unconstitutional. *Quirin,* for instance, has been aptly described as "little more than a ceremonious detour to a predetermined goal."[10] There the Court sustained the president's decision to try and execute the Nazi saboteurs through a military commission even though the author of the Court's opinion, Justice Harlan Fiske Stone, admitted that "the President's order probably conflict[ed] with the Articles of War"[11] and he could not find a convincing argument for how to reconcile the two without leading to "embarrassments" for the Court.[12] Justice Felix Frankfurter was even more forthright: "There can be no doubt that the President did *not* follow the scheme of review under …

8. 338 U.S. 197.

9. 339 U.S. 763.

10. Corwin, *Total War*, 118.

11. Quoted in Alpheus Thomas Mason, "Inter Arma Silent Leges: Chief Justice Stone's View," *Harvard Law Review* 69, no. 5 (1956): 822.

12. Ibid., 824.

the Articles of War," wrote Frankfurter, though he favored—without presenting any legal argument in justification—overlooking this presidential violation of the law.[13] In part, the Court's holding in *Quirin* reflects the justices' understanding that there was little they could do to change the outcome of the case: in a striking display of how limited was the Court's power over the political branches at that time, Franklin Roosevelt's Attorney General, Francis Biddle, "told the Court that the claims of the saboteurs were so frivolous, the Army was going to go ahead and execute the men whatever the Court did; that the executive would simply not tolerate any delay."[14] A decision against the president, in other words, would merely have highlighted the Court's impotence in the face of executive intransigence. But the justices were not merely acting out of political expediency: they themselves *wanted* to find in favor of the president[15] and were willing to uphold his violation of the law despite the questionable precedent it was setting. Much as in *Korematsu v. United States*,[16] where the Court permitted the executive branch to force citizens of Japanese descent into internment camps, a majority of the justices wanted to grant the president leeway to do what he thought necessary and appropriate in the exigent circumstances of war, even if it meant overlooking constitutional violations. They also did not view it as their role to question the president about his wartime

13. Quoted in Mason, "Inter Arma Silent Leges," 822 (emphasis in original).

14. William O. Douglas, *The Court Years, 1939-1975* (New York: Random House, 1980), 139.

15. Justice Frankfurter was appalled that sworn enemies of the United States would even try to use the judiciary to challenge their treatment, see Michal R. Belknap, "Frankfurter and the Nazi Saboteurs," *Supreme Court Historical Society Yearbook* 1982: 66–71; Justice Stone wrote at one point to his colleagues, "I have no doubt of the correctness of our decision not to sustain any of the petitions for habeas corpus" (quoted in Mason, "Inter Arma Silent Leges," 824); and Justice Jackson, in an unpublished concurrence in the case, expressed the view that during wartime, the judiciary should show virtually complete deference to presidential decisions about how to handle prisoners of war, see Jack Goldsmith, "Justice Jackson's Unpublished Opinion in *Ex Parte Quirin*," *Green Bag* 9, no. 3 (2006): 223–231.

16. 323 U.S. 214 (1944).

treatment of detainees. To intervene in such cases risked bringing about public criticism that the Court, as it had done in economic matters prior to the "switch in time," was exceeding its legitimate authority and interfering in policy matters that should be left to the political branches.

Habeas to Challenge Military Commissions

Several of the habeas cases during World War II implicate the same issue as in *Hamdan*: the Court's involvement in judging the legality and constitutionality of military commission.[17] It is important to understand the Court's reasoning and holdings in those cases to see just how far it has moved away from its World War II–era positions. As in *Hamdan*, those petitioners invoked habeas as a means to challenge the legitimacy of military commissions to try them for war crimes. The petitioners relied on two different strands of argument. First, some asserted that even if they were noncitizens or tried abroad, they nonetheless possessed constitutional rights, since neither the Fifth nor Sixth Amendment explicitly limits its protections to U.S. citizens or residents but states that they apply to every "person" (Fifth Amendment) or simply "the accused" (Sixth Amendment).[18] The commissions, they argued, violated their constitutional rights to due process and fair trials, and thus their imprisonment pending or pursuant to such trials was unlawful and subject to habeas relief. Second, they proffered a separation-of-powers argument: that the president's actions were unconstitutional insofar as the commissions

17. See pages 181–190.

18. The Court had already held, decades earlier, that the amendments applied not only to U.S. citizens but to "all persons within the territory of the United States." Wong Wing v. United States, 163 U.S. 228, 238 (1895). Whether they also applied to noncitizens outside U.S. borders was an open question at this time, a question that was answered in the negative in *Eisentrager*.

conflicted with the relevant federal statutes. Again, the end result was that they were being imprisoned contrary to law, and thus habeas relief was appropriate.

Ex Parte Quirin represents the most problematic case constitutionally, since the Court could not absolve itself of responsibility by claiming that its power to intervene on behalf of foreign nationals stopped at the U.S. borders. In *Quirin*, the military commission met in Washington, D.C., to try a group of saboteurs captured within the United States, one of whom was a naturalized citizen. The establishment of such a commission, while "the civil courts [were] open,"[19] seemed in direct conflict to the Court's emphatic denunciation of the domestic use of such legally unsanctioned trials in *Ex Parte Milligan*.[20]

It is worth repeating that the political context threatened to expose how little political capital the Court had at that time. A presidential proclamation released concurrently with the order establishing the military commissions stated that those subject to military commissions "shall not be privileged to seek any remedy or maintain any proceeding directly or indirectly, or to have any such remedy or proceeding sought on their behalf, in the courts of the United States."[21] The trial and subsequent executions of six of the saboteurs happened in the span of a single month, with the Roosevelt administration barely paying heed to the Supreme Court proceedings and indicating its lack of concern for any holding against the legality of its military commissions.[22] The Court hastily released a per curiam opinion upholding the constitutionality and legality of the military

19. *Milligan,* 71 U.S. at 77.

20. See page 137.

21. Proclamation No. 2561, 7 Fed. Reg. 5101 (July 2, 1942).

22. See pages 139–140.

commissions before it even had a chance to fully investigate the relevant case law; a full opinion wasn't released until two months after the executions had occurred. The Court thus had to find a way to reason that *Ex Parte Milligan* was not dispositive, or else admit that it had allowed six illegal executions.

Much like *Marbury v. Madison*, Chief Justice Stone's opinion in *Quirin* emphatically asserted the right of the Court to judicial review of the president's actions, while simultaneously avoiding actually challenging the president's actions. The Court claimed a right to hear the habeas petitions, notwithstanding the presidential proclamation, since the president could not, by fiat, "foreclose[] consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission."[23] While paying lip service to *Milligan,* the Court decided that it was largely inapplicable because Milligan, "not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war,"[24] whereas the saboteurs, acting on behalf of a foreign government at war with the United States, were liable to be tried by a non-civilian court for war crimes. This was a plausible argument, since *Milligan* repeatedly emphasized that the petitioner was a civilian, "never in the military or naval service"[25]; thus, an exception to *Milligan* could be carved out for a spy or saboteur. However, *Milligan* also stated that martial law "can never be applied to citizens in states which have upheld the authority of the government"

23. *Quirin,* 317 U.S. at 25.

24. *Id.* at 44.

25. *Milligan*, 71 U.S. at 118.

and that still have a functioning civilian court system,[26] and one of the *Quirin* saboteurs was, indeed, a U.S. citizen. Moreover, a more straightforward reading of *Milligan* suggested that the key issue was not whether the petitioner was a civilian (or a citizen), but whether it was feasible to try him through the normal civilian justice system—that is, whether the petitioner had violated clearly established federal law (as opposed to customary international law) and whether exceptional circumstances made it impossible for a trial to be held in civilian criminal court. Since World War II was never fought in the United States and there was no question that the federal court system could handle a trial for alleged treason or attempted attacks against U.S. military installations, a straightforward reading of *Milligan* would suggest that a military commission in the United States under such circumstances was unconstitutional.

Arguing that *Milligan* was inapposite, the *Quirin* Court still faced the question of how to square the president's actions with the Fifth and Sixth Amendments and the relevant legislation governing military trials, the Articles of War. The Court dismissed the claim that the president's actions violated the Fifth and Sixth Amendments to the Constitution, arguing that the procedural protections outlined applied only to civilian criminal trials, not to military commission proceedings. However, the commissions held by the Roosevelt administration still appeared to violate several of the procedural

26. *Id*. at 121. The *Quirin* Court made the exact opposite argument: quoting the same line above about the inapplicability of martial law to citizens in states with functioning civilian courts, the *Quirin* Court argued that the *Milligan* Court should be read as making an exception to that general rule for "enemy belligerent[s] either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents." *Quirin*, 317 U.S. at 45. But *Milligan* never explicitly explains the relationship between the petitioner's civilian status and his right to a civilian trial: rather, it is the *Quirin* Court that made the inference that the repeated mention of Milligan's not being a belligerent was relevant to whether he could be subject to martial law. As noted above, it is more likely that the Court's holding was based on the functioning of the civilian court system, and Milligan's civilian status was invoked to further illustrate the impropriety of subjecting him to martial law.

protections guaranteed to defendants under the Articles of War, which were passed specifically to govern military proceedings. The Court had trouble explaining how to reconcile the president's actions with the Articles; it chose, therefore, not to provide any reasoning for its central holding that "the Articles in question could not at any stage of the proceedings afford any basis for issuing the writ."[27] Admitting that "a majority of the full Court are not agreed on the appropriate grounds for decision,"[28] Chief Justice Stone simply outlined possible rationales, without providing any actual argument:

> Some members of the Court are of opinion that Congress did not intend the Articles of War to govern a Presidential military commission convened for the determination of questions relating to admitted enemy invaders and that the context of the Articles makes clear that they should not be construed to apply in that class of cases. Others are of the view that--even though this trial is subject to whatever provisions of the Articles of War Congress has in terms made applicable to "commissions"--the particular Articles in question, rightly construed, do not foreclose the procedure prescribed by the President.... Accordingly, we conclude that … [the president's] Order convening the Commission was a lawful order and that the Commission was lawfully constituted; that the petitioners were held in lawful custody and did not show cause for their discharge.[29]

The Court provided equally unpersuasive reasoning in dismissing habeas suits from two Japanese officials, one a military commander and one a civilian political leader tried by military commissions for war crimes. In *Hirota v. MacArthur*, the Court managed to extricate itself by claiming it lacked jurisdiction over a military commission. Having been established by the joint Allied forces, "the tribunal sentencing these petitioners is not a tribunal of the United States … [and] the courts of the United States have no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed on

27. *Quirin*, 317 U.S. at 47.

28. *Id*.

29. *Id.* at 47–48.

these petitioners," the Court argued in an unsigned per curiam opinion.[30] However, as Justice Douglas pointed out in a concurrence, the commission was, for all practical purposes, run by the United States: a U.S. army general, Douglas MacArthur, was the supreme commander for the Allied powers and thus responsible for establishing the commission. Furthermore, "[a]ll directives embodying policy decisions of the Commission [were] prepared by the United States" and "the Commission [was] enjoined to respect 'the chain of command from the United States Government to the Supreme Commander and the Supreme Commander's command of occupation forces.'"[31] Had the Court wanted to intervene, it could easily have decided the jurisdictional question the other way.[32]

In *Yamashita*, the Court found that it did have jurisdiction to consider the issues at play, in particular, whether the procedures of the military commission convened to try Japanese General Tomoyuki Yamashita, the Supreme Commander of Japanese forces in the Philippines, were in accordance with statutory requirements and Yamashita's rights

30. 338 U.S. at 198.

31. *Hirota v. MacArthur*, 338 U.S. at 206 (Douglas, J., concurring).

32. Douglas believed the Court did have habeas jurisdiction over the commissions: "the chain of command from the United States to the Supreme Commander is unbroken. It is he who has custody of petitioners. It is through that chain of command that the writ of *habeas corpus* can reach the Supreme Commander." *Id.* at 207. He would have dismissed the case on a different ground: the political questions doctrine. He suggested viewing the commission "not … as a judicial tribunal" but as "an instrument of political power": "Insofar as American participation is concerned, there is no constitutional objection to that action. For the capture and control of those who were responsible for the Pearl Harbor incident was a political question on which the President as Commander-in-Chief, and as spokesman for the nation in foreign affairs, had the final say." *Id.* at 215. It is surprising that Douglas would advocate such an approach, since it would allow the Executive to avoid judicial scrutiny simply by relabeling its tribunals as "political" instruments. For someone who said of the writ of habeas corpus that "[t]here is no room for niggardly restrictions when questions relating to its availability are raised." *Id.* at 201. Douglas did not acknowledge how much his theory would undermine the availability of habeas for anyone tried before military commission overseas.

under international humanitarian law,[33] and whether it was charging Yamashita with a crime recognized under the law of war: failing to prevent soldiers under his command from committing atrocities. There was no question that Japanese troops had killed, maimed, and raped thousands of civilians. However, Yamashita was not charged with committing or ordering any such crimes; rather, he was charged with not stopping them. The case presented two distinct questions, one of law, one of fact: first, whether failure to control one's troops (that is, failure of "command responsibility") was a violation of the law of war—and one egregious enough to merit the death penalty—and second, whether Yamashita himself was guilty of such dereliction. Yamashita claimed that he had lost control over many of the soldiers supposedly under his command, that he was not aware of many of the atrocities, and that, in some instances, he had given orders for troops to retreat but was ignored.[34]

The two dissenters made a convincing argument that the commission's procedures violated the Articles of War and prevented Yamashita from having a fair opportunity to defend himself, since his lawyers were given a mere three weeks to prepare a defense against "a vast number of atrocities and crimes allegedly committed by troops under his command,"[35] some of which were not even named until the first day of trial.[36] The dissenters also agreed with Yamashita that he was effectively being punished under an ex post facto law: none of the written documents comprising the law of war at that time

33. In particular, the 1929 Geneva Conventions, which were revised and expanded to form the 1949 Geneva Conventions.

34. Matthew Lippman, "Humanitarian Law: The Uncertain Contours of Command Responsibility," *Tulsa Journal of Comparative and International Law* 8, no. 2 (2001): 9–12.

35. *Yamashita*, 327 U.S. at 57 (Rutledge, J., dissenting).

36. *Id.* at 57–58.

clearly stated that failure to control one's subordinates rises to a war crime,[37] and trying a military leader for inaction rather than action was, in 1946, "unprecedented in our history."[38]

Nonetheless, as discussed further below, the majority of the Court was more concerned with ensuring that the United States could have some effective response to the atrocities of World War II than with protecting the law-of-war rights of Axis members. Some of the justices wanted to make a point: the atrocities committed by the Axis powers needed to have consequences. As a result, a majority of the Court made the dubious argument that the Articles of War weren't applicable to Yamashita's military commission because it was governed instead by the law of war, including its codified components, such as the 1929 Geneva Conventions, and the law of war did not prohibit the procedures and charges used against Yamashita. The Court concluded that the habeas suit should be dismissed because "the commission was a lawful order, … the commission was lawfully constituted, … petitioner was charged with violation of the law of war, … the commission had authority to proceed with the trial, and in doing so did not violate any military, statutory or constitutional command."[39] The willingness to tolerate and even

37. Chief Justice Stone, in his opinion for the Court in *Yamashita*, pointed to several sections of the 1907 Hague Conventions and the 1929 Geneva Conventions as evidence that the law of war recognizes the doctrine of command responsibility (see 327 U.S. at 15–16). However, while those passages recognize the important role that military commanders play in ensuring adherence to the law of war, none suggests that being *unable* to control one's troops could rise to the level of a war crime. That idea, which was not codified in international humanitarian law until 1977 (see Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict [Protocol I] art. 87, June 8, 1977, https://www.icrc.org/ihl/INTRO/470), was so novel at Yamashita's trial that it has now become known as the "Yamashita standard." See Michael L. Smidt, "*Yamashita*, *Medina*, and Beyond: Command Responsibility in Contemporary Military Operations," *Military Law Review* 164 (2000): 155–234; and L. C. Green, "Command Responsibility in International Humanitarian Law," *Transnational Law and Contemporary Problems* 5, no. 2 (1995): 319–372.

38. *Yamashita*, 327 U.S. at 42 (Rutledge, J., dissenting).

39. *Yamashita*, 327 U.S. at 25.

bless questionable judicial practices presents a stark contrast to the Court's behavior in *Hamdan*, when it refused to tolerate similar actions by the executive branch in its treatment of Guantanamo detainees.

Avoiding Jurisdiction Under the Federal Habeas Statute, Part I: *Ahrens v. Clark*

The Court not only refused to entertain challenges to the executive branch's behavior toward Axis members overseas; it also used jurisdictional avenues to avoid having to challenge the executive branch in its domestic treatment of German nationals. In *Ahrens v. Clark*, the Court heard a habeas petition from 120 Germans being held at Ellis Island pending their extradition. The Attorney General had ordered their deportation even though they had not personally fought, or even expressed hostile views, against the United States, because he deemed them "alien enemies" due to their German nationality.[40] The order had come while the war was still being fought against Japan, but after Germany had surrendered. The detainees argued that the Alien Enemies Act did not countenance treating as "alien enemies" the nationals of a country that the United States was no longer fighting. The petitioners, despite being held in New York, filed suit in the District Court for the District of Columbia (DDC) because of where the respondent, the Attorney General, was located.

The Court was not particularly sympathetic to the plight of the German nationals. As one justice described it, "They are alien enemies interned during the war as dangerous to the nation's safety. They now seek to avoid deportation from a country which takes care for personal liberties, even when its hospitality may be abused, to one which denied its

40. See the discussion of the Alien Enemies Act on pages 94–96.

own citizens such rights until its structure of tyranny fell in ruins."[41] If the Court was unwilling to challenge the executive branch in how it treated domestic *citizens* during the war,[42] it was certainly unwilling to do so in regards to a group of foreign nationals from a country which the United States had been fighting only a few weeks earlier.

The Court avoided hearing the case on its merits by claiming that the case had to be dismissed on procedural grounds because the location of the suit conflicted with the requirements of the federal habeas statute. The statute begins, "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions."[43] The *Ahrens* Court claimed that the DDC lacked jurisdiction because the federal habeas statute grants district courts habeas authority only over "their respective jurisdictions," and the detainees in question were being held in New York:

> Although the writ is directed to the person in whose custody the party is detained … the statutory scheme contemplates a procedure which may bring the prisoner before the court.... It would take compelling reasons to conclude that Congress contemplated the production of prisoners from remote sections, perhaps thousands of miles from the District Court that issued the writ.[44]

As the dissenters pointed out, the Court's decision couldn't be explained by any controlling doctrine or even practical necessity: "For the first time this Court puts a narrow and rigid territorial limitation upon issuance of the writ by the inferior federal courts. Heretofore such constrictive formulations have been avoided generally, even assiduously, out of regard for the writ's great office in the vindication of personal

41. *Ahrens,* 335 U.S. at 193–194 (Rutledge, J., dissenting).

42. See Hirabayashi v. United States, 320 U.S. 81 (1943) and *Korematsu,* 323 U.S. 214.

43. 28 U.S.C. § 2241(a).

44. *Ahrens,* 335 U.S. at 190–191.

liberty."[45] It was an unprecedented interpretation of a phrase that most had thought not to have any impact on the statute's meaning, since it merely restated the commonsense notion of jurisdictional limitations on the lower courts, without specifying what those limits were:. "By thus elevating the place of physical custody to the level of exclusive jurisdictional criterion, the Court gives controlling effect to a factor which generally has been regarded as of little or no importance for jurisdictional purposes or for the functioning of the writ in its great office as historically conceived."[46]

Equally as important, the Court purposefully avoided issuing guidelines to the litigants on how to best resolve the jurisdictional issue, keeping open its ability to dismiss the case again for procedural problems if it so chose. If the petitioners refiled the case in the district court in New York with jurisdiction over Ellis Island, it faced the opposite problem as in *Ahrens*: the district court would have jurisdiction over the detainees but not over the attorney general in Washington, D.C., the party to whom the writ would be addressed to "bring the body." This may have suggested that the proper party to address the writ to was not the attorney general who ordered the detention, but the actual jailer—the warden controlling the installation at Ellis Island where the detainees were housed—since historically the immediate jailers were the ones called upon to produce the body and defend the legality of detention. However, the Court explicitly refused to "reach the question whether the Attorney General is the proper respondent."[47] The Court acknowledged that ultimately the detainees were "subject to the custody and control of

45. *Id.* at 194.

46. *Id.* at 196.

47. *Id.* at 193.

the Attorney General"[48] to whom the immediate jailers were answering, but would not say whether the petitioners should nonetheless name the jail wardens in their suit. It seems that, regardless of whom the detainees named in their suit, the Court would have had grounds to argue that they were either the wrong respondents or outside the territory of the district court with proper jurisdiction, providing a way for the Court to dismiss the case on procedural grounds regardless of where it was filed.

Eisentrager

By the time the Supreme Court heard the *Eisentrager* case in 1950, it had already repeatedly indicated that a majority of the justices did not want to intervene in the detainee policies set up by the president and the military to deal with enemy combatants accused with war crimes. Nonetheless, U.S. courts continued to receive hundreds of appeals from former Nazis challenging their continued detention by U.S. and Allied military forces in Europe.[49] The Supreme Court exercised its discretion over its own caseload by declining, without comment, to hear the cases of more than two hundred Nazi prisoners who came to it directly seeking an "original" habeas writ.[50] However, the U.S. Court of Appeals for the D.C. Circuit heard one habeas petition, *Eisentrager v. Forrestal*,[51] from a group of prisoners at the U.S.-controlled Landsberg Prison and found in their favor. The petitioners, Germans formerly living in Japanese-occupied China, had

48. *Id.* at 189 (internal quotation marks omitted).

49. *Eisentrager*, 339 U.S. at 768 n.1.

50. *Id.* For a list of original habeas petitions dismissed without comment, see *Hirota v. MacArthur*, 335 U.S. 876, 877 n.1 (1948) (Jackson, J., dissenting from grant of certiorari).

51. 174 F.2d 961 (D.C. Cir. 1949).

been accused of "collecting and furnishing intelligence concerning American forces and their movements to the Japanese armed forces" during the two months between the surrenders of Germany and Japan.[52] A U.S.-led military commission convicted them of violating the law of war by continuing to help the U.S.'s enemies, despite their own government's unconditional surrender. However, the prisoners claimed that because the United States and Japan were still at war when they had helped the Japanese, and because they had been living in Japanese-controlled territory, "Their activities were legally … and properly conducted within the rules of warfare in the cities … occupied by the armed forces of Japan."[53] Thus, the prisoners argued, "the military commission was without jurisdiction to try them or the offenses with which they were charged or in the manner in which the proceeding was had,"[54] and their subsequent imprisonment in a U.S.-controlled facility was unconstitutional.

The question for the circuit court was not whether the writ should issue, but whether the federal courts had jurisdiction in the first place to hear a petition for the writ from a group of prisoners overseas. The district court had said no, but Judge Elijah Barrett Prettyman, writing for a panel of the D.C. Circuit, reversed, arguing that finding otherwise would be tantamount to suspending the writ, in violation of the Suspension Clause. Citing the "obvious importance of these holdings to both judicial administration and military operations,"[55] the Supreme Court granted certiorari to hear the case.

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52. *Eisentrager,* 339 U.S. at 766.

53. Brief for Respondent, Johnson v. Eisentrager, 339 U.S. 763 (1950) (No. 306), 1950 WL 78515, at *3.

54. 174 F.2d at 963.

55. *Eisentrager,* 339 U.S. at 767.

The Supreme Court could have issued a narrow ruling pertaining to the specific facts in the case at hand. As Justice Robert Jackson's decision noted toward the end, the *Eisentrager* petitioners were not just any foreigner nationals; each

> (a) [wa]s an enemy alien; (b) ha[d] never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and [wa]s at all times imprisoned outside the United States.[56]

Reversing the D.C. Circuit's decision would only have required the Court to hold that an enemy combatant meeting all or most of those six criteria was not entitled to the writ. Instead, hoping to stem any future judicial involvement in such cases and to elaborate a bright-line standard that would allow lower courts to quickly dispose of future habeas appeals from convicted Nazi war criminals, Justice Jackson suggests that U.S. courts can never issue a writ of habeas corpus on behalf of foreign nationals captured and detained abroad because "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act."[57] Jackson noted that an exception might be found for U.S. citizens living abroad—as it was, seven years later, in *Reid v. Covert*[58]—because citizenship creates a special juridical relationship between the citizen and government that might extend beyond the government's sovereign borders.[59] However, no such relationship existed between the government and foreign nationals who had not stepped foot on American soil.

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56. *Id.* at 777.

57. *Id*. at 771.

58. 354 U.S. 1 (1957).

59. *Eisentrager*, 339 U.S. at 769.

While the standard that Jackson's opinion sets forth is clear—foreign nationals detained abroad cannot petition for habeas writs in U.S. courts—the reasoning which led him to it is not. Jackson frames the "ultimate question" in the case as "one of jurisdiction,"[60] but he bases his claim about the courts' lack of jurisdiction on the assertion that "the privilege of litigation has been extended to aliens … only because permitting their presence in the country implied protection."[61] As a general rule, however, that is inaccurate: "The courts of the United States have traditionally been open to nonresident aliens,"[62] and, as the dissenters in *Eisentrager* pointed out, previous cases from aliens abroad—for instance, that of General Yamashita—were dismissed on substantive grounds, rather than a finding that the Court had no jurisdiction.[63] Jackson may have been thinking of the limited category of nonresident "alien enemies,"[64] but, by basing his claims about jurisdiction on the geographic location of the petitioners rather than their nationality or actual belligerency, his argument logically also covers nonresident "friendly aliens," a category that has not traditionally been barred from U.S. courts, even during wartime.

More importantly, while Jackson says the case solely involves jurisdiction, he also discusses substantive issues about the merits of the detainees' claims, such as the

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60. *Id.* at 765.

61. *Id.* at 777–778.

62. *Rasul*, 542 U.S. at 484.

63. "The contention that enemy alien belligerents have no standing whatever to contest conviction for war crimes by habeas corpus proceedings has twice been emphatically rejected by a unanimous Court … habeas corpus jurisdiction is available even to belligerent aliens convicted by a military tribunal for an offense committed in actual acts of warfare." *Eisentrager,* 339 U.S. at 794–795 (Black, J., dissenting).

64. As discussed on pages 94–96, under U.S. law, the term "alien enemy" (or "enemy alien") refers to a national of a country with which the Unites States is at war, whether or not that individual is actually hostile toward the United States.

inapplicability of most constitutional protections to nonresident aliens. In some parts of the opinion, Jackson seems to be suggesting that the main issue is not jurisdictional at all, but that foreign aliens lack any substantive constitutional protections, such as a Fifth Amendment right to due process, that could be vindicated through habeas corpus.[65]

As the discussion in Chapter I makes clear, this is a misunderstanding of habeas, for it views it only as a vehicle for the vindication of other constitutional rights, when, in fact, it can be viewed as creating its own "structural right" by restraining the federal government's ability to arbitrarily imprison people. In *Eisentrager*, all three federal courts to hear the case failed to recognize this important fact. The district court first dismissed the case based on *Ahrens*, finding that there was no jurisdiction. Because *Ahrens* was a purely statutory holding and habeas has a constitutional basis, the appeals court found that reasoning wanting. Prettyman argued that such an interpretation would be tantamount to finding that Congress had indirectly—and unconstitutionally—suspended the writ. However, a limitation of habeas jurisdiction only counts as an unconstitutional *suspension* if those affected are otherwise entitled to the "privilege" to have a habeas petition heard. The appeals court found that this privilege applied to the Landsberg petitioners not because of the Suspension Clause but because of the Fifth Amendment. "The Fifth Amendment, by its terms, applies to 'any person'," Prettyman argued, and, in his view, "any person deprived of his liberty by an official of the United States Government in violation of constitutional prohibitions, has a substantive right to a

65. For instance, at one point Jackson summarizes the decision as follows: "After hearing all contentions [the petitioners] have seen fit to advance and considering every contention we can base on their application and the holdings below, we arrive at the … conclusion … that no *right* to the writ of habeas corpus appears." *Id.* at 781 (emphasis added).

writ of habeas corpus."[66] In other words, as Justice Jackson later described this reasoning, "Right to the writ,… is a subsidiary procedural right that follows from possession of substantive constitutional rights."[67] Because Justice Jackson disagreed about the applicability of the Bill of Rights to noncitizens overseas, he rejected the notion that the Landsberg prisoners had any right to the writ.

Ironically, Prettyman discussed the notion of habeas as a structural limitation on the government without reaching the conclusion that it might have force independent of other guarantees of constitutional rights. To bolster his argument that the writ should apply with equal force to foreign nationals at Landsberg as to American citizens domestically, Prettyman said that

> constitutional prohibitions apply directly to acts of Government, or Government officials, and are not conditioned upon persons or territory. That is the nub of this whole matter. If the action of Government officials be beyond their constitutional power, it is for that reason a nullity … we think that a distinction between citizens and aliens cannot be made in respect to the applicability of constitutional restrictions upon the power of government.[68]

However, Prettyman never clarified whether he viewed the actions of executive branch officials as potentially being "beyond their constitutional power" because they exceeded the Article I grant of authority to the executive branch, or because they transgressed the Fifth Amendment rights of the prisoners. Because the Court of Appeals had opened the door to the Fifth Amendment question, Justice Jackson ignored the constitutional-power question and focused on rebutting the notion that the Fifth Amendment applied extraterritorially: "The Court of Appeals has cited no authority

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66. Eisentrager v. Forrestal*,* 174 F.2d 961, 963–965 (D.C. Cir. 1949) (hereinafter, *Forrestal*).

67. *Eisentrager,* 339 U.S. at 781.

68. *Forrestal,* 174 F.2d at 965.

whatever for holding that the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses."[69] By rejecting the applicability of constitutional protections to aliens abroad, Jackson seems to have believed he was simultaneously rejecting the notion of the prisoners having a "subsidiary procedural right" to habeas. The remainder of his opinion, largely irrelevant to either the jurisdictional or substantive question, focuses on the negative repercussions that would result if the Court were to decide otherwise—namely, that it would immunize the U.S.'s enemies from being held accountable for war crimes.[70]

Only the Supreme Court dissenters took the structural-right argument to its logical conclusion and noted that habeas might be used, not to vindicate the prisoners' constitutional rights (if they had any), but to "to test the legality of criminal sentences imposed by the executive," through what the dissenters termed a "limited habeas corpus review."[71] In his dissenting opinion, Justice Black noted that the main question in the case wasn't about constitutional rights at all, but "whether the military tribunal was legally constituted and whether it had jurisdiction to impose punishment for the conduct charged"[72]—a traditional habeas inquiry into the legality of detention. Because the question was not about the rights possessed by the prisoners but about the power of the executive branch to imprison, Black concluded, "I would hold that our courts can exercise it whenever any United States official illegally imprisons any person in any land

69. *Eisentrager,* 339 U.S. at 783.

70. "When we analyze the claim prisoners are asserting and the court below sustained, it amounts to a right not to be tried at all for an offense against our armed forces." *Id.* at 782.

71. *Id.* at 797 (Black, J., dissenting).

72. *Id.*

we govern."[73]

Black's view is not without difficulty, however. In particular, whether it is a feasible approach depends on how one views Justice Sutherland's argument in *Curtiss-Wright* that the courts have no role policing the separation of powers and restraining the federal government in foreign affairs. If one views that claim as central to the holding of the case, and as still valid law, then the Suspension Clause should also be viewed as placing no limits on how the Executive chooses to act overseas. If, however, one interprets much of the opinion as dicta, as Justice Jackson himself did only two years after *Eisentrager*,[74] or if one believes that the holding has been effectively overruled *sub silentio* by developments since, as the Court's power to challenge the other branches has vastly increased, then *Curtiss-Wright* poses no barrier.

This is a debate to which the federal courts would return decades later, during the War on Terror. *Eisentrager* clearly stands for the proposition that the Fifth Amendment guarantee of due process has no extraterritorial application, but it does not necessarily mean that the U.S. government has free reign to imprison anyone it chooses outside U.S. borders, especially if the *Curtiss-Wright* rule is no longer (or was never truly) valid. One

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73. *Id.* at 798.

74. "Much of the Court's opinion [in *Curtiss-Wright*] is dictum, but the ratio decidendi is contained in the following language: 'When the President is to be authorized by legislation to act in respect of a matter intended to affect a situation in foreign territory, the legislator properly bears in mind the important consideration that the form of the President's action--or, indeed, whether he shall act at all--may well depend, among other things, upon the nature of the confidential information which he has or may thereafter receive, or upon the effect which his action may have upon our foreign relations. This consideration, in connection with what we have already said on the subject, discloses the unwisdom of requiring Congress in this field of governmental power to lay down narrowly definite standards by which the President is to be governed…. As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers.'" *Youngstown*, 343 US at 643 (1952) (Jackson, J., concurring) (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)) (internal citation and quotation marks removed).

could view the Suspension Clause as generally restraining the power of the government to imprison people without judicial process, even if those imprisoned lack other substantive constitutional rights. However, that would require a judiciary willing to hear the appeals from noncitizens detained abroad and assert a power to intervene in foreign affairs, at least in this one particular area.

Adapting Habeas to the War on Terror

As documented in the previous chapter, the Bush administration adopted the stance that the fight against terrorism was a "war" specifically because that gave it expanded powers compared with the law-enforcement approach. Jack Goldsmith has explained, "The government's decision to embrace a war framework was not only, or even primarily, about using the military in battle. The war lens also carries with it important legal powers," such as "the power to kill enemy soldiers with impunity" and the power to initiate military commissions to try captured soldiers.[75] It can also serve as a powerful public relations tool, not only rallying the country together behind a common enemy but excusing executive overreaching done in the name of saving lives: "When a nation is unambiguously at war and believes its future is at risk, practices that would have seemed wrong in peacetime are viewed as necessary and thus legitimate."[76] However, a "war framework" also imposes responsibilities on a government, including in its detention policies. Most importantly, the norms and conventions comprising the law of war require governments to treat detainees humanely, to abstain from torture, to make a genuine

75. Goldsmith, *Terror Presidency*, 106.

76. Ibid., 115.

effort to separate belligerents and criminals from innocent civilians captured by mistake, and to submit those suspected of committing war crimes to fair trials.

The historical evidence suggests that the United States attempted to follow these rules during and after World War II. Moreover, the World War II–era habeas petitions did not come from individuals who claimed they were innocent civilians taken into custody by accident. Rather, the habeas petitions to the Court all came from admitted Axis soldiers, spies, or sympathizers who objected to being tried for war crimes or who called into question the fairness of the judicial proceedings used to evaluate their guilt. The issue of whether it was the place of the Court to scrutinize overseas military tribunals of suspected war criminals (and admitted former enemies) divided the justices. Some sympathized with the petitioners who claimed they were not being given a fair chance to defend themselves. However, the majority had the opposite concern: that, if the Court were to sustain the objections to the tribunals, it would end up immunizing war criminals from any trial whatsoever. "When we analyze the claim prisoners are asserting and the court below sustained, it amounts to a right not to be tried at all for an offense against our armed forces," wrote Justice Jackson for the majority in *Eisentrager*. But, he continued,

> It is not for us to say whether these prisoners were or were not guilty of a war crime, or whether if we were to retry the case we would agree to the findings of fact or the application of the laws of war made by the Military Commission. The petition shows that these prisoners were formally accused of violating the laws of war and fully informed of particulars of these charges…. If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts.[77]

Having served as the chief U.S. prosecutor at Nuremberg, Jackson, in particular, was outraged about the possibility of letting war criminals entirely avoid punishment for their

77. *Eisentrager*, 339 U.S. at 786–787 (internal quotation marks and citation omitted).

actions. Much as with the U.S.'s military tribunals that were the subject of the habeas petitions in *Eisentrager, Hirota,* and *Yamashita*, the Nuremberg Tribunals had come under fire from legal observers who felt the entire proceedings were mere "victor's justice." Justice Douglas, for instance, claimed that they were illegitimate because,

> no matter how finely the lawyers analyzed it, the crime for which the Nazis were tried had never been formalized as a crime with the definiteness required by our legal standards, nor outlawed with a death penalty by the international community. By our standards that crime arose under an ex post facto law. Goering *et al.* deserved severe punishment. But their guilt did not justify us in substituting power for principle.[78]

Jackson strongly disagreed. "The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored," he noted in his opening remarks at Nuremberg.[79] He similarly had little sympathy for Japanese and Germans suspected of war crimes who attempted to evade trial by arguing in U.S. court that their military tribunals were unconstitutional. "No suggestion is advanced by the court below or by prisoners of any constitutional method by which any violations of the laws of war endangering the United States forces could be reached or punished, if it were not by a Military Commission in the theatre where the offense was committed,"[80] he noted. And to the argument that the habeas petitioners were being tried for ex post facto crimes, he responded, "That there is a basis

78. Quoted in Richard J. Goldstone and Adam M. Smith, *International Judicial Institutions: The Architecture of International Justice at Home and Abroad* (New York: Routledge, 2009), 54.

79. Robert H. Jackson, "Opening Statement before the International Military Tribunal," November 21, 1945, http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/opening-statement-before-the-international-military-tribunal/.

80. *Eisentrager*, 339 U.S. at 782–783.

in conventional and long-established law by which conduct ascribed to them might amount to a violation seems beyond question."[81]

The World War II–era Supreme Court was concerned that Axis war criminals were trying to evade trial for their crimes. By contrast, the concern animating the Court's habeas decisions during the War on Terror was that the U.S. government was trying to keep the Guantanamo detainees *out* of court, even as many detainees wanted the chance to show their innocence.[82] The choice of Guantanamo Bay as a facility to house detainees had much to do with the issue of judicial oversight. The portion of Guantanamo leased to the United States is a jurisdictional anomaly: it is one of the few places in the world under the de facto control of the United States but legally the property of another country. A 1903 lease and subsequent 1934 treaty grant the United States "complete jurisdiction and control over and within" the leased area, for as long as it chooses to remain there, even though Cuba technically retains legal (de jure) sovereignty.[83]

As early as December 2001, senior Bush administration officials were discussing the possibility of turning Guantanamo Bay into a detention center because it would be both under the complete control of the U.S. military and likely outside the jurisdiction of the U.S. courts.[84] "[T]he great weight of legal authority indicates that a federal district court

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81. *Id.* at 787.

82. *Hamdan* might seem to be an exception, since there the issue was whether the Bush administration could proceed with a military commission that the petitioner wanted to halt. However, as the discussion in the next chapter will make clear, Hamdan's case had important differences to those of the World War II–era petitioners, and the nature of the military commission that Bush convened makes it hard to argue that it was designed to give Hamdan a chance to show his innocence.

83. *Rasul*, 542 U.S. at 471 (quoting Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, Art. III, T.S. No. 418).

84. Memorandum from Deputy Assistant Attorneys General Patrick F. Philbin and John Yoo to William J. Haynes II, General Counsel, Department of Defense. *Re: Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba* (Dec. 28, 2001).

could not properly exercise habeas jurisdiction over an alien detained" at Guantanamo, the Bush Justice Department advised the Department of Defense in 2001.[85] According to Goldsmith, "The Pentagon considered other facilities besides [Guantanamo Bay], including military bases inside the United States and on the Island of Guam,"[86] but in addition to their being "relatively easy targets for terrorists to attack[,] … detentions there were more likely to be subject to legal challenges since they were on U.S. soil."[87] Using Guantanamo "seemed like a good bet to minimize judicial scrutiny."[88] As one Bush administration critic noted, there would have been little reason for the United States to move detainees from the Middle East all the way to Cuba had it not been because Guantanamo Bay was one of the few places in the world under complete U.S. control yet outside U.S. sovereign territory: "The purpose of holding the prisoners at Guantanamo Bay was … to put them beyond the rule of law, beyond the protection of any court, and at the mercy of the victors."[89]

Indeed, until the Supreme Court issues its *Rasul* decision, lower courts, citing *Eisentrager*, dismissed all appeals from detainees at Guantanamo.[90] Meanwhile, the United States moved an increasing number of suspected terrorists to the naval base, some

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85. *Id.* at 1. The authors added that they could not "say with absolute certainty" what would happen if detainees tried to file for writs of habeas corpus because "no [Supreme Court] decisions … clearly foreclose the existence of habeas jurisdiction there."

86. Goldsmith, *Terror Presidency*, 108.

87. Ibid.

88. Ibid.

89. Johan Steyn, "Guantanamo Bay: The Legal Black Hole," *International and Comparative Law Quarterly* 53, no. 1 (2004): 8.

90. See, e.g., Rasul v. Bush, 215 F.Supp.2d 55 (D.D.C. 2002) and Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003).

of whom "were apprehended on the battlefield in Afghanistan, others in places as far away from there as Bosnia and Gambia."[91] Until *Rasul*, little attempt was made to distinguish the real terrorists from civilians captured by mistake. The prisoner population included "large numbers of Taliban foot soldiers recruited in Saudi Arabia and the Yemen, several dozen humanitarian aid workers from Saudi Arabia and other Gulf countries, a handful of religious students, a complex mix of jihadists, naïve idealists and economic refugees from Europe and North Africa, and, in the case of the Chinese prisoners, a group of desperately poor men caught up in the wrong war."[92] Lawyers for the detainees complained that their clients were being denied any opportunity to defend themselves, having not even been told why they were being held.[93] The situation was ripe for intervention by the Supreme Court.

91. *Boumediene*, 553 U.S. at 734.

92. Andy Worthington, *The Guantanamo Files* (Ann Arbor, MI: Pluto Press, 2007), 49.

93. Linda Greenhouse, "Justices to Hear Case of Detainees at Guantanamo," *New York Times*, November 11, 2003, A1.

Chapter VI: Habeas Corpus in the War on Terror

On June 28, 2004, the Supreme Court released two momentous opinions about the treatment of detainees during the War on Terror. *Hamdi v. Rumsfeld* dealt with an American citizen whom the Bush administration planned to imprison indefinitely; *Rasul v. Bush* dealt with foreign nationals in a similar position. Both cases show the Court struggling to determine its proper role in the War on Terror. The same day, the Court also issued its opinion in *Padilla v. Rumsfeld*, in which the Court invoked jurisdiction as a way to abstain from deciding even more significant constitutional questions than in the other two cases.

Because Hamdi was a U.S. citizen, it is unsurprising that the Supreme Court almost unanimously[1] found in his favor, stating that the president could not detain a citizen, even one captured on the battlefield fighting against U.S. forces, indefinitely without judicial process. Hamdi is notable not because of the holding, but because of how it demonstrates the Court's grappling with the Bush administration's claim that the War on Terror was so different than previous conflicts that the Court should not question the president's determinations of military necessity at all, even those that resulted in the indefinite imprisonment without process of a U.S. citizen. The Court emphatically rejected the idea that it could not—or should not—intervene: "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[2] *How* to intervene, however, divided the Court. Scalia and Stevens wanted to treat Hamdi as a traditional

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1. Eight of the justices supported Hamdi's position, though no single opinion was joined by a majority of the justices. Justice Clarence Thomas was the sole advocate of allowing the president to imprison Hamdi indefinitely without a habeas corpus hearing into the legality of the detention.

2. *Hamdi,* 542 U.S. at 536.

combatant fighting against his own country and have him tried for treason in federal civilian court, or released. However, the Bush administration argued that Hamdi was properly subject to military detention without trial until the end of hostilities because the point of his detention was not to punish him but to prevent him from rejoining the enemy.[3] Scalia and Stevens rejected this notion, but a plurality of the Court, in an opinion written by Justice Sandra Day O'Connor, accepted the Bush administration's claim that it had the authority to detain in military custody, without a civilian trial, a U.S. citizen captured on a foreign battlefield fighting on behalf of the enemy. Justice O'Connor argued that the Authorization of Military Force (AUMF) passed by Congress after 9/11 should be construed as "explicit congressional authorization for the detention of individuals"[4] fighting against the United States, since "[t]he capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by universal agreement and practice, are important incident[s] of war."[5] However, she argued that the difficulty in this case was that Hamdi had not been given any chance to contest his designation as an "enemy combatant," and the Fifth Amendment guarantee of due process required some form of judicial process to ascertain whether he was being wrongly held: "[A] citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair

3. The administration had also found that holding him incommunicado in a military prison made it easier to interrogate him, but the Court emphatically rejected that he could be detained indefinitely without trial for that purpose. See *Hamdi*, 542 U.S. at 521.

4. *Hamdi*, 542 U.S. at 517.

5. *Id.* at 518 (quoting *Quirin*, 317 U.S. at 28) (internal quotation marks and citation removed).

opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[6]

Notably, none of the justices adopted the Bush administration's view that the War on Terror was unique and required, at least at that point in time, a deviation from the norms governing the traditional conduct of war. Scalia said that, if this was truly a new type of war requiring the executive to have exceptional powers, it was up to Congress to properly suspend the writ of habeas corpus. Discussing the traditional powers of the executive during wartime, he noted,

> I frankly do not know whether these tools are sufficient to meet the Government's security needs, including the need to obtain intelligence through interrogation. It is far beyond my competence, or the Court's competence, to determine that. But it is not beyond Congress's. If the situation demands it, the Executive can ask Congress to authorize suspension of the writ—which can be made subject to whatever conditions Congress deems appropriate, including even the procedural novelties invented by the plurality today. To be sure, suspension is limited by the Constitution to cases of rebellion or invasion. But whether the attacks of September 11, 2001, constitute an "invasion," and whether those attacks still justify suspension several years later, are questions for Congress rather than this Court. If civil rights are to be curtailed during wartime, it must be done openly and democratically, as the Constitution requires, rather than by silent erosion through an opinion of this Court.[7]

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6. *Id.* at 533.

7. *Hamdi,* 542 U.S. at 577–578 (Scalia, J., dissenting) (internal citation removed). It is unlikely that the other members of the Court share Scalia's view that it is entirely up to Congress to judge whether the requirements for suspension outlined in the Suspension Clause have been met. Scalia describes suspension as a political question, unreviewable by the judiciary, but it is unclear why the Supreme Court would hold that analyzing the question of whether habeas has been properly suspended is any different from its usual use of judicial review to ensure compliance with constitutional dictates. It is possible that, faced with this situation in an earlier time, the Court would have recognized that it lacked the institutional capital to challenge the political branches on such a matter and thus would have invoked the political question doctrine to absolve itself of responsibility for ensuring compliance with the Suspension Clause. However, the Supreme Court today undoubtedly has the institutional power to claim jurisdiction over the question of whether Congress is acting in accordance with the text of Article I. Scalia's main argument is that it is unclear whether the 9/11 attacks constitute an "invasion," but just as the political branches and the public have recognized the wisdom of granting the judiciary some latitude in interpreting the vagaries of the Bill of Rights, it would make sense to have the judicial branch interpret the meaning of the text of the Suspension Clause—including what counts as a legitimate "invasion"—to ensure that the political branches are not exceeding their constitutional limits. If the Suspension Clause is to properly restrain the political branches, then it is better left to a third party, rather than those whose power would be aggrandized, to determine whether the conditions have been met for such a drastic curtailment of individual liberty as the suspension of habeas corpus. As with many other issues previously deemed nonjusticiable political

O'Connor likewise emphasized that her understanding of how to settle Hamdi's case was "based on longstanding law-of-war principles,"[8] and that, since there was ongoing fighting on the ground in Afghanistan, the Court did not at that point have to grapple with the Bush administration's claim that the War on Terror would be ongoing even in the absence of battlefield fighting. However, she warned, "If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel."[9] The Court, in fact, seemed almost relieved that the circumstances of the fighting in Afghanistan and Hamdi's capture on a battlefield meant that it could avoid the much more difficult questions about how to deal with the treatment of a citizen in a situation that did not resemble a traditional wartime battle—the type of situation that the Court also narrowly avoided facing in the *al-Marri* case several years later.[10] However, the Court could not long ignore the Bush administration's claim that the War on Terror was "different," for many of the Guantanamo detainees there had been captured not on a battlefield, but while living as civilians in the Middle East or North Africa.

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questions, what counts as an "invasion," and whether an "invasion" is still proceeding years after a domestic attack, are questions that today are best answered by the branch that has evolved the authority to interpret the Constitution: the judiciary.

8. *Hamdi*, 542 U.S. at 521 (plurality opinion).

9. *Id.*

10. See pages 15–17 for a discussion of this case.

Rasul: The First Intervention at Guantanamo

As noted in Chapter II, the Court attempts, whenever possible, to settle disputes on the basis of statutory rather than constitutional reasoning. In the first two of the three Guantanamo cases it heard, the Court was able to push back against presidential overreaching on statutory grounds. In *Rasul v. Bush*, the Court found that the federal habeas statute—the legislation that has evolved over time out of the original grant of habeas jurisdiction to the federal courts in the Judiciary Act of 1789—gave the Guantanamo detainees a right to file for habeas writs in federal court. Its reasoning, however, left many puzzled.

To avoid a constitutional argument, the Court had to reinterpret the federal habeas statute to apply to Guantanamo Bay, even though the *Eisentrager* Court had said that there was no statutory authority for granting habeas to a noncitizen detained in a facility (in that case, Landsberg Prison) outside the United States. Justice John Paul Stevens, writing for the majority, argued that, the constitutional question notwithstanding, the statutory situation had changed.

Justice Stevens claimed that the *Eisentrager* Court had dismissed, without much discussion, any relevance of the habeas statute to the Landsberg prisoners because of the Ahrens holding that courts could only issue writs if the official responsible for imprisonment was in "their respective jurisdiction."[11] However, in a 1973 federal habeas case challenging a state-court criminal conviction, *Braden v. 30th Judicial Circuit Court of Kentucky*,[12] the Court acknowledged that developments in the quarter century since

11. See pages 149–152.

12. 410 U.S. 484 (1973).

Ahrens had severely undercut that rule. Not only had the Court issued rulings that appeared at odds with the Ahrens rule, but Congress had made amendments to the federal habeas statute that assumed that district courts would sometimes hear habeas cases from distant prisoners.[13] Stevens therefore concluded that "[b]ecause *Braden* overruled the statutory predicate to *Eisentrager*'*s* holding, *Eisentrager* plainly does not preclude the exercise of § 2241 jurisdiction over petitioners' claims."[14]

However, there is no indication in the *Eisentrager* decision that Jackson viewed *Ahrens* as relevant to the situation of the Landsberg prisoners. The district court dismissed the case on the basis of *Ahrens,* but, once the Circuit Court turned it into a question of the constitutional guarantee of habeas, the relevance of the habeas statute disappeared. Jackson's only mention of *Ahrens,* besides describing the lower court rulings, was in noting the practical difficulties that would occur if the Court were to find that prisoners halfway around the world had a right to habeas—namely, that the United States would have to devote much time and effort to "bring the body" to a court back in the United States. *Ahrens* was invoked only to show that the Court had "consistently adhered to and recognized the general rule" that a "basic consideration in habeas corpus practice is that the prisoner will be produced before the court."[15] The *Ahrens* jurisdictional rule was never discussed, and Jackson seemed to think that the habeas statute was irrelevant, not because *Ahrens* foreclosed any consideration of its

13. *Id.* at 497.

14. *Rasul*, 542 U.S. at 479. For a discussion of Stevens's role in the *Ahrens* case and how it may have affected his decision in *Rasul*, see Joseph T. Thai, "The Law Clerk Who Wrote *Rasul v. Bush*: John Paul Stevens' Influence from World War II to the War on Terror," *Virginia Law Review* 92, no. 3 (2006): 501–532.

15. *Eisentrager,* 339 U.S. at 778. As noted in Chapter IV, this changed in the mid-twentieth century.

applicability, but because it did not lend itself to different considerations than the constitutional guarantee of habeas: if the Landsberg prisoners had no constitutional rights, and habeas was (in Jackson's view) merely a way to vindicate constitutional rights, then they had no right to (or need for) a habeas hearing, regardless of whether that hearing was based on the statutory or constitutional provision of habeas.

The notion that *Braden* "overruled the statutory predicate" of *Eisentrager* was also a novel interpretation of *Braden*, since that opinion, dealing with habeas for a domestic convicted criminal, does not mention *Eisentrager* or questions of extraterritorial application of the habeas statute. Although the petitioners in *Rasul* brought up the changes in the interpretation of the habeas statute wrought by *Braden*,[16] their main argument wasn't that *Eisentrager* was no longer relevant to the reach of the habeas statute, but that *Eisentrager* had *never been* relevant, because the situation of the Guantanamo detainees was so different from that of the Landsberg prisoners:

> *Eisentrager* stands for the sensible proposition that enemy aliens, who had been tried and convicted overseas by a duly constituted military tribunal established under law, could not obtain review of their convictions in the U.S. civil courts. The Court did not hold in that case that aliens who had *not* been tried or convicted, or even charged, could be detained indefinitely without even a hearing—just because they were kept outside our borders.[17]

Rasul's lawyer even responded to a question about the relationship between *Ahrens* and *Eisentrager* at oral arguments by stating, "Your Honor, respectfully, I don't think you

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16. In their brief on the merits to accompany their petition for a writ of certiorari, the *Rasul* petitioners mention in a footnote how *Braden* overturned the *Ahrens* rule that "require[d] the petitioner's presence within the jurisdiction" of the court for the writ to issue. Petitioners' Brief on the Merits, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343), 2004 WL 162758, at *12 n.8. However, they do not claim that this had any effect on the *Eisentrager* statement about the lack of availability of habeas for foreign nationals detained abroad, since, as discussed above, Jackson does not seem to have viewed *Ahrens* as at all relevant to the case. That connection is drawn only by Justice Stevens.

17. Brief for Petitioners, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343), 2004 WL 96764, at *8–9.

can fairly read Justice Jackson's opinion [in *Eisentrager*] as adopting the *Ahrens v. Clark* position."[18]

The complex interpretative twists and turns in Justice Stevens's opinion can only be explained by looking at what he was hoping to accomplish. Stevens repeatedly hinted at the moral imperative in hearing the Guantanamo detainees' challenge. The detainees at this point had been held, along with hundreds of others, for two years. They argued that they were innocent civilians swept up by the United States and not given a chance to establish that they were being unjustly imprisoned. Unlike the *Eisentrager* detainees, they were not acknowledged members of an enemy force; many had, in fact, been captured far away from the fighting in Afghanistan.[19] Recognizing the importance of granting some opportunity to the detainees to have their claims of innocence heard, the Court looked at how it might reach the conclusion that the detainees had a right to habeas.

At the same time, the majority wanted to reach this conclusion without overruling or even reinterpreting *Eisentrager.* The reasons why will be discussed at length in Chapter VII; here it is worth noting only that the majority rejected an alternative approach to finding for the petitioners, one that avoided the counterintuitive *Ahrens–Bradens–Eisentrager* connection. Justice Anthony Kennedy, who joined the majority in its judgment, stated that "the Court's approach is not a plausible reading of *Braden* or *Johnson v. Eisentrager*."[20] Instead, he tried to view *Eisentrager* as presenting, not an inflexible rule about the availability of habeas to foreign nationals overseas, but a more

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18. Transcript of Oral Argument, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343), 2004 WL 943637, at *11.

19. See *Rasul*, 542 U.S. at 475–476.

20. *Rasul*, 542 U.S. at 485 (Kennedy, J., concurring in the judgment).

nuanced consideration of factors that led to its conclusion that the specific prisoners in that case could not appeal for habeas:

> The decision in *Eisentrager* indicates that there is a realm of political authority over military affairs where the judicial power may not enter…. A faithful application of *Eisentrager,* then, requires an initial inquiry into the general circumstances of the detention to determine whether the Court has the authority to entertain the petition and to grant relief after considering all of the facts presented. A necessary corollary of *Eisentrager* is that there are circumstances in which the courts maintain the power and the responsibility to protect persons from unlawful detention even where military affairs are implicated…. The facts here are distinguishable from those in *Eisentrager* in two critical ways, leading to the conclusion that a federal court may entertain the petitions.[21]

Kennedy claimed that his approach, unlike Justice Stevens', "would avoid creating automatic statutory authority to adjudicate the claims of persons located outside the United States, and remains true to the reasoning of *Eisentrager.*"[22] His concern with adopting an inflexible rule granting every prisoner held worldwide by the United States "automatic" access to the courts for habeas petitions is similar to his reasoning for avoiding that situation in the constitutional context, as will be discussed in Chapter VII. His claim that his approach "remains true to the reasoning of *Eisentrager*," however, is clearly incorrect. *Eisentrager* stood for a bright-line jurisdictional rule that noncitizens detained abroad had "no right to the writ of habeas corpus."[23]

By refusing to overrule that constitutional holding, the *Rasul* majority kept the Court's involvement in the execution of the War on Terror abroad at an absolute minimum, in keeping with its tradition of staying out of most issues of foreign policy. In the *Hamdi* decision, issued the same day, the Court talked at length of the constitutional

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21. *Id.* at 487.

22. *Id.* at 488.

23. *Eisentrager*, 339 U.S. at 781.

demands on the president in his treatment of citizens during a time of war, especially if those citizens have been transported back to the United States. By contrast, Justice Stevens' *Rasul* opinion, dealing with foreign nationals abroad, carefully avoids any mention of the Constitution. It doesn't even say that the detainees have particular constitutional rights that can be vindicated through habeas; quite the contrary, it presents the issue as the traditional habeas corpus approach of inquiring into the legality of detention. Stevens said that the federal habeas statute "requires nothing more" than that the petitioners are being held by the U.S. government and are arguing that "they are being held in federal custody in violation of the laws of the United States."[24] And, in a footnote that led to much confusion among the lower courts in hearing the case on remand,[25] Stevens claimed,

> Petitioners' allegations--that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing--unquestionably describe "custody in violation of the Constitution or laws or treaties of the United States."[26]

What did Stevens mean by this? To what part of the Constitution, or to what "laws or treaties of the United States," was he referring? He leaves this unsaid, but there are at least two potential answers. First, he may have been referring to one or more of the

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24. *Rasul*, 542 U.S. at 483–484.

25. Judge Joyce Hens Green, the first judge to consider this on remand, went to lengths to try to make sense of the Court's declaration in *Rasul*, interpreting it as indicating that the petitioners *must* have some "constitutional and other substantive rights" that could be vindicated through a habeas suit. In Re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 454 (2005). However that is not necessarily what Stevens meant, since the claim could also be read as implying that the imprisonment was impermissible, not because it went against federal law, but because it was unauthorized by any law and therefore contravened constitutional limitations on the president that restrict him to imprisoning people only pursuant to established law.

26. *Rasul*, 542 U.S. at 484 n.15.

international human rights treaties discussed in Chapter III, to which the United States is a signatory and which explicitly grant certain protections to those captured during fighting.[27] Second, Stevens may have been referring to the structural limits that the Constitution places upon the executive: Article I has never been interpreted to grant the president unlimited power to detain people without judicial process, and, as discussed in Chapter I, the Anglo-American legal tradition has always viewed such detentions as a particular affront to the rule of law. Thus, constitutional *protections* may apply to foreign nationals detained abroad even if they lack constitutional *rights*. And, it should be noted, the majority stuck to a statutory holding in the hopes that it would not be necessary to overrule or distinguish *Eisentrager,* which claimed that foreign nationals abroad lack such substantive constitutional rights.

Avoiding Jurisdiction Under the Federal Habeas Statute, Part II: From *Ahrens* to *Padilla*

In the previous chapter, I discussed how the Court avoided hearing a World War II–era case from imprisoned German nationals at Ellis Island by reinterpreting a jurisdictional rule governing the federal habeas statute. The Court used this approach again during the War on Terror to avoid having to address a difficult constitutional issue about the limits of presidential power that the Court hoped it could avoid deciding.

Ahrens left open the question of whether, when high-level executive branch officials order domestic detentions, a habeas petition should be addressed to the officials or to the officer in charge of the facility where the detainee is being kept. The Court answered the "proper respondent" question during the War on Terror, again using jurisdictional

27. However, this would raise the complex question of whether rights conferred by these treaties can be enforced by a court; see footnote 50 in Chapter I.

arguments to avoid hearing a case, *Rumsfeld v. Padilla*.[28] In a controversial and closely divided opinion, the Court dismissed a habeas suit brought by a U.S. citizen, Jose Padilla, who was detained under suspicion of being an Al Qaeda agent and imprisoned, without trial, by the Department of Defense in a South Carolina naval brig. Lower court opinions had addressed difficult and heated questions about the president's ability to imprison U.S. citizens militarily, often reaching differing conclusions about the president's power in the aftermath of the 9/11 attacks. The Supreme Court, however, was able to avoid issuing any decision on the merits by dismissing for lack of jurisdiction. The Court's 5-person majority argued that Padilla had improperly named the president and secretary of defense as respondents when the proper respondent was the commander of the military brig, the prisoner's "immediate custodian." Furthermore, it argued, the case needed to be refiled in the United States District Court for the District of South Carolina, the district court with jurisdiction over the naval brig.

The timing of the case is important because it occurred only three years after the 9/11 attacks. The opinion was released on the same day as *Hamdi* and *Rasul*, in which the Court pushed back against some of the Bush administration's more audacious claims of executive power. However, in both of those cases, the practical outcome of the decision was simply to guarantee some judicial process to both Hamdi and the Guantanamo detainees in order to ensure they were not improperly detained. The Court did not hold it improper for the president to order the military detention of suspected terrorists captured overseas or, in the case of a U.S. citizen, one captured on a battlefield fighting against U.S. forces. To the contrary, the Supreme Court gave its blessing to such a practice, as

28. 542 U.S. 426.

long as the detainees were given a fair chance to show they were not actually terrorists or enemies of the United States. By contrast, *Padilla* required the Court to rule on a momentous question of constitutional law: whether the president could ever subject a U.S. citizen detained *domestically* to military detention. This practice seemed at odds with two U.S. laws—the Non-Detention Act and the Posse Comitatus Act[29]—and with *Ex Parte Milligan*'s famous holding that the military cannot exert control over civilians as long as the civilian justice system is functional. Whereas some of the justices wanted to use the case to answer "questions of profound importance to the Nation,"[30] a majority of the Court was willing to give the president some leeway given the exigencies of war, and the invocation of jurisdictional principles—"passive virtues," in Bickel's terminology—allowed it to get around issuing any opinion on the merit, thus avoiding setting a precedent it might later regret. In the end, the Court's treatment of the case permitted it to avoid having to address that issue at all, at least in relation to Padilla, since the Bush administration eventually transferred Padilla to a civilian prison to face trial in federal court.[31]

Judicial Process after *Rasul* and *Hamdi*

The Department of Defense (DoD) responded to *Hamdi* and *Rasul* by setting up Combatant Status Review Tribunals (CSRTs) to evaluate the evidence on detainees,

29. The Posse Comitatus Act, 18 U.S.C. § 1385, prohibits the use of military forces to enforce domestic laws except under very specific circumstances. The Non-Detention Act, 18 U.S.C. § 4001(a), prohibits the federal government from detaining or imprisoning a citizen "except pursuant to an Act of Congress."

30. *Padilla*, 542 U.S. at 455 (Stevens, J., dissenting).

31. Linda Greenhouse, "Justices Let U.S. Transfer Padilla to Civilian Custody," *New York Times*, January 5, 2006, http://www.nytimes.com/2006/01/05/politics/politicsspecial1/05padilla.html.

especially those at Guantanamo, and determine whether it supported their classification as "enemy combatant[s]."[32] Neither Court decision required such a process—the federal courts could have handled such hearings —but the DoD apparently hoped to undercut the two holdings by providing an alternative to the federal courts and showing that it was no longer denying judicial process to detainees. Indeed, after initiation of the CSRTs, the Justice Department moved to dismiss a series of habeas cases from the Guantanamo detainees on the grounds that habeas would only repeat the same evaluation of the evidence that was already underway in the CSRTs. However, the district court refused to grant the motion to dismiss after finding that the procedures adopted by the DoD for the CSRTs had "constitutional defects."[33] According to Judge Joyce Hens Green, the CSRTs failed to provide the detainees with a fair chance to show their innocence. The CSRT procedures did not follow the normal rules of evidence, going so far as to allow consideration of evidence obtained through torture. They also placed the burden on the detainees to show they were innocent, rather than on the government to establish guilt, while simultaneously denying to the detainees access to much of the evidence they were told they had to rebut to establish their innocence. Moreover, detainees were not allowed access to lawyers to help them defend themselves in the CSRT hearings.

The shortcomings of the CSRTs were brought into even sharper relief in a November 2006 study by a professor and students at Seton Hall University School of Law. Based on a review of the written records from 393 CSRTs, the report found that the actual hearings

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32. Memorandum from Deputy Secretary of Defense Paul Wolfowitz to the Secretary of the Navy. *Order Establishing Combatant Status Review Tribunal* (July 7, 2004), http://www.defense.gov/news/Jul2004/d20040707review.pdf.

33. *In Re Guantanamo Detainee Cases,* 355 F. Supp. 2d at 468.

failed to provide even the minimal legal process outlined in the written procedures for the CSRTs:

> In the majority of the CSRT hearings, the Government rested on the presumption that the classified evidence was sufficient to establish that the detainee was an enemy combatant. The Government never called any witnesses and rarely adduced unclassified evidence. In the majority of cases, the Government provided the detainee with no evidence, declassified or classified, which established that the detainee was an enemy combatant. Instead, the Government provided the detainee merely with what purported to be a summary of the classified evidence. This summary was so conclusory that it precluded a meaningful response. The Government then relied on the presumption that the secret evidence was reliable and accurate.[34]

In some instances, the report showed, detainees found not to satisfy the criteria to be classified an enemy combatant were sent to second and even third CSRTs, with different tribunal members, until a CSRT reached the opposite conclusion.[35]

By the time the Seton Hall report was published, however, the CSRTs had become the only legal process through which Guantanamo detainees could attempt to challenge their incarceration. As noted in the introduction, in response to *Rasul*, Congress amended the federal habeas statute in the Detainee Treatment Act of 2005 (DTA) to strip the courts of jurisdiction to hear habeas cases from Guantanamo detainees. The DTA seemed to make moot a particularly groundbreaking case making its way through the federal courts: *Hamdan v. Rumsfeld*.

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34. Mark Denbeaux et al., *No-Hearing Hearings. CSRT: The Modern Habeas Corpus? An Analysis of the Proceedings of the Government's Combatant Status Review Tribunals at Guantanamo* (Newark, NJ: Seton Hall University School of Law, n.d.), 5, http://law.shu.edu/publications/guantanamoReports/final_no_hearing_hearings_report.pdf.

35. Ibid., 37–39.

Hamdan and Military Commissions

While the Bush administration tried to keep the Guantanamo detainees out of federal court, it wanted some mechanism to punish those behind the 9/11 attacks. Its solution was to resurrect military commissions of the type used during World War II to punish Nazi and Japanese war criminals such as General Yamashita and the *Quirin* saboteurs. The president did not want to charge the detainees with violating federal statutes: that would have placed their crimes clearly within the jurisdiction of either the civilian criminal justice system or the military's established system for courts martial, whose rules are carefully laid out in the Uniform Code of Military Justice (UCMJ) and other federal regulations. Instead, the Bush administration claimed that it was charging the detainees for violations of the "common law of war," that is, of international treaties or customary international law governing the behavior of combatants. As it did for the World War II commissions, this approach appeared to give the executive branch much greater leeway to run the trials as it saw fit, creating its own regulations and deciding what constituted a violation of the common law of war. The first individual slated to be tried, Salim Ahmed Hamdan, filed suit in federal court to block trial by such a commission, arguing that the executive branch could not circumvent the relevant statutory law—the UCMJ—and protections for defendants under international humanitarian law through such an approach.

The precedents from World War II stood for the idea that the president should have wide latitude to convene military commissions as he saw fit for military detainees, especially those who were foreign nationals captured and detained abroad. From a legal perspective, the Guantanamo detainees closely resembled the Landsberg prisoners in

Eisentrager: they had no prior relationship with the U.S. government, they were neither citizens nor legal residents of the United States, and they were accused of war crimes in the midst of a military conflict against U.S. forces. Moreover, both *Yamashita* and *Quirin* suggested that the Supreme Court would not strictly hold the president to the statutory rules governing military proceedings nor to the general principles about fair judicial proceedings in international humanitarian law. If there was one theme from the World War II–era cases, it was deference to the president's determination of how best to hold the U.S.'s enemies accountable.

However, even if the detainees' legal standing might have been similar, there were important differences between the World War II–era habeas petitioners and the detainees at Guantanamo. None of the Axis petitioners denied fighting against the United States or contributing to the Axis war efforts; they argued instead they had not been *unlawful* combatants committing acts in violation of the law of war. In the aftermath of a bloody war that had claimed millions of lives and involved an unprovoked attack on U.S. soil, the Court was not interested in investigating that distinction or challenging the president on how to deal with admitted enemies of the United States. By contrast, Hamdan and his fellow detainees at Guantanamo argued they had never fought against the United States and had been captured by accident, never having been given a chance to show their innocence. The point of *Rasul* was to provide them with some process to prove that they had been wrongly imprisoned, and yet the military commissions convened by Bush wanted to convict them through a process that seemed guaranteed to produce a guilty verdict.

At the circuit court level, Hamdan's case was dismissed on the basis of the WWII precedents. However, the Supreme Court, in an opinion written by Justice Stevens, reversed that holding, in the process revisiting and revising many of the Court's World War II–era precedents. As a preliminary matter, the Court had to deal with the fact that the DTA amended the federal habeas statute to strip the federal courts of jurisdiction over the Guantanamo detainees. Displaying the same counterintuitive readings of statutes as in *Rasul*, Justice Stevens said that the DTA should be read as depriving the Court of jurisdiction only over new habeas cases, not those pending when the DTA was passed.[36]

Turning to the substance of the case, Justice Stevens, writing for the majority, repeatedly referenced the *Quirin* precedent; however, he purposefully avoided the particular facts and findings of the case and, instead, invoked it for the general proposition that the federal courts have an important role to play in adjudicating the legality and constitutionality of military commissions, even on behalf of foreign nationals.[37] He noted that the Court there had seen it as its role to analyze whether the military commissions convened by the president accorded with congressional statute—ignoring the Court's complete failure in *Quirin* to provide an argument about *how* to

36. *Hamdan,* 548 U.S. at 572–584.

37."Far from abstaining pending the conclusion of military proceedings, which were ongoing, we convened a special Term to hear the case and expedited our review. That course of action was warranted, we explained, '[i]n view of the public importance of the questions raised by [the cases] and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty, and because in our opinion the public interest required that we consider and decide those questions without any avoidable delay.'… *Quirin* 'provides a compelling historical precedent for the power of civilian courts to entertain challenges that seek to interrupt the processes of military commissions.'" *Hamdan,* 548 U.S. at 588–589 (quoting *Hamdan v. Rumsfeld*, 415 F.3d 33, 36 (D.C. Cir. 2005)) (internal citation omitted).

reconcile the two[38]—and thus argued that it was merely continuing in that tradition by accepting Hamdan's petition.[39]

Even though the UCMJ resembled the previous Articles of War in most respects, when it came to considering the legality of the Bush administration's military commissions, the Court reached conclusions contrary to *Quirin* in almost every respect. The president, Justice Stevens claimed, had failed to "satisfy the most basic precondition … for establishment of military commissions: military necessity,"[40] since Hamdan had been captured years earlier and safely detained far away from a battlefield: "Any urgent need for imposition or execution of judgment is utterly belied by the record."[41] Of course, the same held true in *Quirin*: the saboteurs had been captured and detained before having had the opportunity to commit sabotage, and they could have easily been tried in federal court rather than by a military commission convened in Washington, D.C.

Confronting the separation-of-powers issue, Stevens found that "the commission lacks power to proceed"[42] because it used procedures that violated the UCMJ. The order governing the military commissions "dispenses with virtually all evidentiary rules applicable in courts-martial,"[43] allowing the use of evidence obtained through coercion

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38. He did suggest that he found the Chief Justice Stone's argument less than convincing, referencing "*Quirin's* controversial characterization of Article of War 15 as congressional authorization for military commissions," which, he said, the Court had no need to reexamine, since the Articles of War had since been replaced by the UCMJ (*Hamdan,* 548 U.S. at 593).

39. At one point, Stevens even chastises Justice Thomas for "ignor[ing] the reasoning in *Quirin*" in his dissent when criticizing the Court's interpretations of the UCMJ (*Hamdan,* 548 U.S. at 594 n.24).

40. *Hamdan,* 548 U.S. at 612.

41. *Id*.

42. *Id.* at 613.

43. *Id.* at 621.

and torture; it also states that "the accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding that either the Appointing Authority or the presiding officer decides to 'close.'"[44] Because the executive failed to provide a compelling reason why these deviations from the UCMJ rules for courts martial were necessary, the Court could not countenance them. Stevens admitted that the Court had approved of similar deviations from the Articles of War rules governing courts martial in *Yamashita*—a "glaring historical exception to this general rule"[45] that military commissions must follow the same rules as statutorily regulated courts martial—and he implied that perhaps the dissenters in the case had a point in their "unusually long and vociferous critique"[46] of the commission procedures. Nonetheless, Stevens argued, *Yamashita* was no longer good precedent because subsequent legislative developments rendered it inapplicable.[47]

Perhaps most surprising, the Court also declared for the first time that the Geneva Conventions of 1949 were legally binding on U.S. officials, since the UCMJ obligates military commanders to obey the law of war, of which the Geneva Conventions are an integral part.[48] This was a striking reversal of the Court's position during World War II "that responsibility for observance and enforcement of these rights [conferred by international humanitarian treaties] is upon political and military authorities,"[49] rather

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44. *Id.* at 614.

45. *Id.* at 617

46. *Id.* at 618.

47. *Id.* at 618–620.

48. *Id.* at 625ff.

49. *Id.* at 627 (quoting *Eisentrager,* 339 U.S. at 789).

than the judiciary. As discussed earlier, the Bush administration argued that it should not feel restricted by international humanitarian laws, like the Geneva Conventions, which, it believed, were developed for traditional inter-state wars. The emphatic declaration of the Court to the contrary, reasserting the relevance of international humanitarian protections to all types of military conflict involving the United States, represented a further demonstration by the Court that it did not accept the "new type of war" reasoning that the executive branch was using to circumvent any limitations on its power.

In a portion of his opinion that only three other members of the Court joined—and that, therefore, did not become part of the official opinion of the Court—Justice Stevens also found that Hamdan had not been charged with an act that constituted a crime under the common law of war. Rather than identifying a specific act that Hamdan had committed that would constitute a war crime—a difficult task, since he was not a military general or terrorist mastermind, but Osama bin Laden's driver[50]—the Bush administration decided to charge Hamdan with conspiracy to commit war crimes. This was, Stevens found, not "among those offenses cognizable by law-of-war military commission."[51] Stevens left open the possibility that his actions might qualify as some sort of crime, "but it is not an offense that 'by the law of war may be tried by military commissio[n].'"[52] The distinction here is important because it relates to the reasons why the Bush administration chose the military commission process. As noted previously, Hamdan was not charged with a violation of statute specifically because the

50. The charges alleged he was also bin Laden's bodyguard and helped arrange for the transportation of weapons for use by other al Qaeda members, see *Hamdan,* 548 U.S. at 570. Hamdan, however, claimed he had played no part in supporting terrorism and was merely a service worker.

51. *Hamdan,* 548 U.S. at 611.

52. *Id.* at 612 (quoting 10 U.S.C. § 821) (brackets in original).

administration hoped to free itself from the UCMJ's requirements for military-justice proceedings. The administration could do so by claiming that the violation was of customary international law and thus a military commission was the proper body with jurisdiction to hear such a case[53]; and the procedures for such commissions are not laid out clearly in any U.S. statute—hence the debate in *Hamdan* over whether the executive branch must follow the procedures for courts martial or has free reign to deviate from them as it sees fit. By asserting that conspiracy was "not triable by… [a] military commission"[54] operating under the common law of war, Stevens was not saying that Hamdan should be freed; rather, he was arguing for the necessity, if Hamdan were to be tried, of identifying clear, overt violations of the law of war for which he was responsible, or for bringing him within the purview of an established body of law with clear procedures for trying defendants. "To demand any less would be to risk concentrating in military hands a degree of adjudicative and punitive power in excess of that contemplated either by statute or by the Constitution,"[55] Stevens states in *Hamdan*.

In sum, Stevens's opinion in *Hamdan* was a striking repudiation of the Bush administration's behavior. However, it is notable for what it did not say. It did not make any constitutional holdings: the entire basis for its argument was federal statute and international laws made applicable to the United States through federal statute. Its

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53. Even this claim is questionable, though, since U.S. law incorporates many parts of the international law of war into federal statute. For instance, the War Crimes Act (18 U.S.C. § 2441) makes it illegal for anyone, "whether inside or outside the United States, [to] commit[] a war crime … defined as a grave breach" of the Geneva and Hague Conventions or other international humanitarian treaties. Thus, one of the main reasons why the military commissions were necessary in World War II—because no written body of law seemed to outlaw many of the atrocities committed, and thus no domestic court would have proper jurisdiction—no longer applies.

54. *Hamdan*, 548 U.S. at 600.

55. *Id*. at 602.

separation-of-powers analysis still dealt with the president's transgression of rules laid down by Congress. And in a concurrence, Justice Stephen Breyer stressed that the Court was *not* saying that the president could never subject the detainees to the type of military commissions he wanted—even though, as Justice Stevens found, they failed to provide the detainees a fair opportunity to defend themselves. Rather, Breyer argued,[56]

> The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a "blank check." Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.[57]

In fact, the Bush administration did just that, and, in one of its last acts before the midterm election, the Republican-controlled 109th Congress enacted the Military Commissions Act (MCA) of 2006 to approve the commission procedures that were struck down in *Hamdan*. The MCA also went further than the DTA in stripping the federal courts of jurisdiction over the Guantanamo detainees: whereas Stevens was able to argue in *Hamdan* that the DTA did not apply to habeas cases pending at the time of its enactment, the MCA explicitly said that it applied, "to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001."[58] This would make it exceptionally difficult for the Supreme Court to intervene on behalf of the detainees absent striking down part of the MCA

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56. Notably, Justice Stevens did not join this concurrence, even though the other three justices joining the majority opinion did. Stevens may have been more concerned with the inherent unfairness of the military commissions' rules promulgated by the Bush administration than were the other justices, who focused on the separation-of-powers concern.

57. *Hamdan*, 548 U.S. at 636 (Breyer, J., concurring) (quoting *Hamdi*, 542 U.S. at 536) (internal citation removed).

58.Military Commissions Act of 2006 § 7, 120 Stat. 2636.

as unconstitutional—and the Court had, until 2006, never before found a federal statute to be in violation of the Suspension Clause.

Nonetheless, advocates for the Guantanamo detainees pressed on in their litigation. They recognized that the now-congressionally approved military commissions afforded little chance for their clients to gain their freedom: the procedures were the same as those that the Court had struck down in *Hamdan* as contrary to the fair-trial provisions of Common Article 3 of the Geneva Conventions, allowing hearsay and testimony obtained under torture to be used as evidence. Moreover, the Bush administration was not planning to try all the detainees in the immediate future, and it asserted the right to continue holding detainees as it saw fit, even those absolved of crimes in a military commission.

Lawyers for Guantanamo detainee Lakhdar Boumediene asked a federal appeals court to declare the jurisdiction-stripping provision of the MCA unconstitutional, but the appeals court held that *Eisentrager* precluded such a result, and only the Supreme Court could overrule that precedent. The Supreme Court was hesitant to intervene again, having had its statutory decisions twice repudiated by congressional action. When the *Boumediene* case first came before the Court, it denied certiorari; a statement by Justices Stevens and Kennedy suggested that the Court was wary of addressing the complicated constitutional issues about habeas at Guantanamo that it had so carefully avoided in *Rasul*.[59] However, the Court issued a "stunning announcement" three months later that it would take the case after all.[60] Speculating on what had changed, *New York Times* legal correspondent Linda Greenhouse noted that new evidence pointed to the shortcomings of

59. *Boumediene v. Bush*, 549 U.S. 1328 (2008) (statement of Justice Stevens and Justice Kennedy respecting denial of certiorari).

60. Linda Greenhouse, "Clues to the New Dynamic on the Supreme Court," *New York Times*, July 3, 2007, A11.

the CSRTs and the need for independent judicial review of the Guantanamo detentions. According to Greenhouse,

> [D]ays before the justices were to consider the "petition for rehearing" filed by the detainees' lawyers, those lawyers filed a final brief that included a remarkable document, a description of how the "combatant status review tribunals" worked written by an Army officer, Lt. Col. Stephen Abraham, who had been a member of one. The statement, the detainees' lawyers said in their brief, made it clear that the process was "an irremediable sham."[61]

Deciding *Boumediene*

The MCA's language made it virtually impossible for the Court to find habeas jurisdiction over Guantanamo by creative statutory interpretation, as it has in *Rasul*. To hear habeas appeals from Guantanamo, the Court would have to strike down the MCA as unconstitutional, an outcome not only unprecedented but largely foreclosed by *Eisentrager*, which had declared that foreign nationals abroad had no constitutional right to even access U.S. courts.

When the Court finally issued its momentous decision, it did not overrule *Eisentrager.* Rather, it claimed that its holding, which extended a constitutional right to habeas corpus hearings to the Guantanamo detainees, was in keeping with *Eisentrager's* reasoning. Why didn't the Court simply strike down *Eisentrager*? To answer that question, one must step back and consider a larger question that relates to the conflict between *Eisentrager* and *Boumediene*: the shortcoming of governing through inflexible, bright-line rules. The next chapter explores the problems with legal formalism in general, and then in the particular context of the Court's habeas decisions. It concludes by

61. Ibid.

defending *Boumediene's* outcome and suggesting how the Court could have clarified the reasoning behind its holding.

Chapter VII: Rules, Constitutional Interpretation, and the *Boumediene* Decision

In Chapter III, I discussed how one aspect of the traditional war paradigm is that wars are of a limited duration. Whatever flexibility is granted to the executive branch to extend its powers to fight off a foreign power, it is assumed that these powers will wane when the war comes to a close. This is what occurred in the World War II era: the excess deference shown to the president in *Eisentrager, Quirin*, and the Japanese internment cases—to the point of sanctioning a racist and wholly unjustified policy—was replaced, only a few years after the war ended, with a willingness to hold the president accountable to stricter limits on his exercise of power, especially domestically.[1] Nonetheless, the precedents on the treatment of detainees during wartime were never repudiated, and *Quirin* and *Eisentrager* remained good law until the War on Terror.

In *Boumediene* the Court had to address what seemed to be a major limitation on its authority to hear detainee cases in the aftermath of the Military Commissions Act: the precedent from *Eisentrager* stating that foreign nationals detained abroad have no constitutional right to habeas corpus. This precedent was presented as a bright-line rule based on the distinction between citizens and domestic residents on the one hand, and foreign nationals abroad on the other. It dealt not with the totality of circumstances involved, but with the simple question of whether there might be some reason for the Court to feel obligated to intervene, either because those detained were citizens of the United States, which undoubtedly creates a legal relationship, or because "lawful presence in the country creates an implied assurance of safe conduct and gives [a foreign

1.In the 1952 *Youngstown* case, discussed on pages 59–60 and 90–91.

national] certain rights."[2] If the detainees were random people with no preexisting relationship to the United States, though, the Court said it was powerless to intervene.

The *Eisentrager* rule created a problem with the Court's intervention at Guantanamo, but the Court seemed hesitant to replace it with another rule about the extraterritorial applicability of the Suspension Clause. Instead, it developed a malleable test that would allow lower courts to intervene when they saw fit, while avoiding those cases that seemed fraught with problems. To understand how and why the Court chose this approach, it is necessary to look more broadly at the Court's approach to constitutional interpretation broadly, and why it is sometimes hesitant to frame its decisions in terms of general rules.

Formalism vs. Functionalism

In interpreting the vague language of the Constitution, the Court has oscillated between two different approaches. In some cases, the Court, rather than staying close to the facts in a particular case, has announced general rules, based on abstract principles of law and legal interpretation, that can be applied to large number of cases. This can be considered the formalist approach: it gives clear guidance to the lower courts—and future Supreme Court justices—on how to decide similar cases by outlining rules that they can follow, rules that have "the appearance of being self-contained, apolitical, and inexorable."[3] This frees future judges looking at similar cases from having to grapple with the fundamental questions of principle; all they have to do is figure out which rule is relevant, and how the particular facts in a future case influence how that rule is to be implemented. By

2. *Eisentrager*, 339 U.S. at 771.

3. Morton J. Horwitz, "The Rise of Legal Formalism," *American Journal of Legal History* 19, no. 4 (1975): 252.

announcing in advance a particular rule that should be followed, a formalistic decision theoretically removes discretion from future judges to invoke policy or ideological considerations in reaching a conclusion. As Frederick Schauer has described it, "Formalism is the way in which rules achieve their 'ruleness' precisely by doing what is supposed to be the failing of formalism: screening off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account."[4]

By contrast, in other cases, the Court has recognized it as advantageous to *avoid* issuing such broad rules and instead reach a holding that is sensitive to—and only applicable to—the particular facts at issue in the case at hand. Cass Sunstein has argued in favor of this approach, which he terms *judicial minimalism*, or what others have termed the "common-law approach" to interpretation. "Courts deciding particular cases have limited authority over the subsequent reach of their opinion,"[5] he notes. "Rules laid down in advance may … misfire. The process of a case-by-case decision maintains a degree of flexibility for the future; past cases might well be distinguished if they seem to go wrong as applied to new circumstances."[6] The minimalist approach is also more in keeping with the notion of judicial restraint discussed in Chapter II (insofar as one accepts that it is a valid method of adjudication of constitutional cases). By considering only the issues necessary to resolve a particular case, and by avoiding constitutional claims that could affect vastly different (and unpredictable) circumstances, the Court

4. Frederick Schauer, "Formalism," *Yale Law Journal* 97, no. 4 (1988): 510.

5. Cass Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, MA: Harvard University Press, 2001), 21.

6. Ibid., 44.

adheres to "the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more."[7]

The minimalist approach allows for consideration of the particular facts of a case and how those facts shape the legal issues at play. Although it does not follow particular rules, it is not an unbounded exercise of judicial discretion, because it still follows particular *principles*. As Ronald Dworkin has discussed, there is a key difference between these two concepts: "they differ in the character of the direction they give. Rules are applicable in an all-or-nothing fashion"[8] whereas principles capture "requirement[s] of justice or fairness or some other dimension of morality"[9] without pointing to a particular outcome. Principles are, instead, factors to be taken into consideration in decision making, and often they conflict with other principles at issue. A sensitive decision maker needs to figure out how to reconcile the principles at stake.

Equally as important, the minimalist approach also leaves room for judges to incorporate practical considerations and ideological values into the decision-making calculus, since it eschews the issuance of broad rules that judges should feel bound to apply without consideration for the consequences. In other words, in contrast to the formalist conception of constitutional interpretation as the development and application of general rules, the common-law approach can be considered a form of functionalist or instrumentalist legal reasoning, in which any principles and rules that are applied are not

7. PDK Labs v. Drug Enforcement Agency, 362 F. 3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment).

8. Ronald Dworkin, "The Model of Rules," *University of Chicago Law Review* 35 (1967): 25.

9. Ibid., 23.

considered in the abstract but with an appreciation for the context and outcome of the case at hand.

Justice Antonin Scalia is the current court's most vocal advocate of the formalist approach. In his essay "The Rule of Law as the Law of Rules," Scalia argues that, in a true constitutional democracy, judges must limit themselves to "the pronouncement of general principles" and rules applicable to a wide variety of cases.[10] Otherwise, courts not only usurp the power of the legislature, but end up applying different reasoning to different cases, thus violating one of the most fundamental principles of the rule of law in a liberal democracy: equal treatment for all.[11] It is antithetical to the rule of law,

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10. Ibid. I believe this description of formalism is mistaken insofar as it conflates principles and rules. Because principles do not lead to particular outcomes, "the pronouncement of general principles" hardly suffices to remove judicial discretion, as the formalist approach aims to do.

11. This objection could be taken even further: doesn't granting discretion to judges to use a functionalist approach effectively eliminate the rule of law and replace it with the unpredictable decisions of judges? In other words, doesn't it represent arbitrary rule, of the type that is antithetical to individual liberty, as discussed in Chapter I? Several factors serve to alleviate this concern. First, the process through which judicial review of legislation for constitutionality operates is important. The judiciary is not putting forward guidelines for *individual* behavior; rather, it is determining whether laws already passed by Congress (or, similarly, policies enacted by the Executive) should remain on the books. Individuals are expected to comply with all democratically established laws unless and until the judiciary decides that they violate constitutional provisions. The concern with arbitrary rule is that individuals will be held liable for actions that were not illegal at the time committed, thus placing them at the whim of the government. With judicial review, the question is not what the law is, but whether the law should be allowed to continue. Just as future changes to the law do not pose a threat to individual liberty as long as they are not enforced retroactively (i.e., ex post facto), judicial nullification of already enacted laws does not suggest that individuals will be left subject to anyone's arbitrary whim. Rather, it suggests that already announced laws may be changed in the future.

Second, the Constitution, by its very nature, is not a set of rules, but a set of principles. The Framers left much of it indeterminate—a statement of values rather than guidelines for particular cases—so that it could apply to many circumstances, some impossible to foresee. As long as the judiciary has the power to explicate the Constitution (as I defend in Chapter II), it will be uncertain whether laws passed by Congress are constitutional until the judiciary has a chance to pass judgment. Granted, the development of formalistic rules for constitutional adjudication would make the legislators' jobs easier and allow them to better predict what the judiciary expects of them; but such uncertainty poses no threat to the legislators' freedom, nor does it threaten individuals with arbitrary rule as long as the executive sticks to enforcing the announced laws (even if they later may be nullified).

Third, the need for stability and predictability in the judiciary's decision-making processes has to be balanced against the fact that the underlying purpose of judicial review for constitutionality is to determine whether legislation accords with certain values. If the announcement of adjudicative rules fails to carry out that purpose, there is no reason to engage in such judicial review in the first place. Thus, it is preferable to have some unavoidable uncertainty than to undermine the entire purpose of the institution of judicial

according to Scalia, to grant judges the power to decide constitutional cases on the basis of anything other than broad rules reflecting the principles underlying constitutional provisions. By saying that a case

> must be decided on the basis of the totality of the circumstances, or by a balancing of all the factors involved, [a judge] begins to resemble a finder of fact more than a determiner of law. To reach such a stage is, in a way, a regrettable concession of defeat—an acknowledgment that we have passed the point where "law," properly speaking, has any further application. And to reiterate the unfortunate practical consequences of reaching such a pass when there still remains a good deal of judgment to be applied: equality of treatment is difficult to demonstrate and, in a multi-tiered judicial system, impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired.[12]

Scalia's preferred approach is not to approach each case as, in some way, unique; rather, it is to fit each case into broad rules that have either been laid out in advance, in previous court decisions, or that are laid out in an opinion before application to the case

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review, which stands for the proposition that the legislature is bound to respect certain fundamental rights and values in its deliberations.

Because my discussion here is focused on constitutional adjudication, I have not discussed how the formalist vs. functionalist debate plays out in the Court's other main interpretive task: statutory construction. In such cases, there is usually uncertainty about what the law means altogether—a function of the inherently indeterminate nature of written language, as discussed below. If that is the issue, neither adjudicative mechanism, formalism or functionalism, can accomplish the desired goal of predictability, because the meaning of the law itself will be unclear until the judiciary construes it. In such cases, there is a legitimate concern that individuals will not know what is expected of them ahead of time, raising the specter of arbitrary rule. This is why courts are empowered to issue injunctions blocking enforcement of a particular law until the judiciary has had a chance to pass judgment on its meaning and constitutionality. And, if the law is so unclear as to provide no definitive guidance of what is required of individuals, the courts can void it for vagueness.

More broadly, the debate about formalism versus functionalism risks making it appear that the choice is between, on the one hand, a formalistic approach to law where the law is completely determinate and its applicability to every situation results in the outcome envisioned by its drafters, and, on the other hand, a functionalist approach where the law mostly reflects the judiciary's subjective judgments and arbitrary decisions. In reality, however, the choice is hardly that simple. The formalistic approach risks failing to carry out the underlying intentions of the law or recognizing that the law as written will always have shortcomings in its meaning and applicability to particular cases. The functionalist approach recognizes this and thus empowers a minimal level of discretion among judges: not to give them the power of arbitrarily rule, but to ensure that the inherent shortcomings of written law do not impede its effectiveness. There is, then, a choice not between a formalistic interpretation that accords with the rule of law and a functionalist approach that fails to do so, but between two systems that are both imperfect, reflecting the inherently imperfect nature of positive law.

12. Antonin Scalia, "The Rule of Law as a Law of Rules," *University of Chicago Law Review* 56, no. 4 (1989): 1182.

at hand. In his view, this method, as the quote above indicates, ensures not only the even treatment of all related cases—that is, respect for the principle that all citizens are to be treated equally—but also that other governmental actors know exactly where the law stands in crafting future policies. The guarantee of predictability is, according to Scalia, particularly important: "Even in simpler times uncertainty has been regarded as incompatible with the Rule of Law. Rudimentary justice requires that those subject to the law must have the means of knowing what it prescribes…. Predictability … is a needful characteristic of any law worthy of the name. There are times when even a bad rule is better than no rule at all."[13]

But the question Scalia's argument raises is whether rules can capture the myriad considerations that must go into judicial decision making of a particular case. Scalia admits that *some* cases might not be amenable to rules—"every rule of law has a few corners that do not quite fit"[14]—but he doesn't see this as a reason to generally give up his formalistic approach insofar as rules can be developed.[15] However, philosophers since

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13. Ibid., 1179.

14. Ibid., 1177.

15. Realizing that the Constitution, when announcing principles, often does not provide any rules for their application, Scalia ties his argument about rule making to his other main interpretive method: originalism. In noting that the central provisions of the Constitution are vague and undefined as written, he claims that the only way they can be given content without resorting to each justice's subjective value judgments is to interpret them based on their "original understanding" when drafted:

> The principal theoretical defect of nonoriginalism, in my view, is its incompatibility with the very principle that legitimizes judicial review of constitutionality. Nothing in the text of the Constitution confers upon the courts the power to inquire into, rather than passively assume, the constitutionality of federal statutes. That power is, however, reasonably implicit because, as Marshall said in *Marbury v. Madison*, (1) "[i]t is emphatically the province and duty of the judicial department to say what the law is," (2) "[i]f two laws conflict with each other, the courts must decide on the operation of each," and (3) "the constitution is to be considered, in court, as a paramount law." Central to that analysis, it seems to me, is the perception that the Constitution, though it has an effect superior to other laws, is in its nature the sort of "law" that is the business of the courts—an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law. If the Constitution were not that sort of a "law," but a novel invitation to apply current societal values, what reason would

Aristotle have pointed out that the development and application of rules often fails to produce results that accord with our sense of justice. In the *Nicomachean Ethics*, Aristotle argued that even theoretically just rules, when applied to particular situations, may result in unjust outcomes; "legal justice"—abiding by the letter of the law—is not the entirety of justice and needs on occasion a "correction" through the use of equity, or particularized judgments about how rules should be applied and perhaps tempered.[16] As Aristotle acknowledges, equity is necessary because law by its very nature cannot take into account the totality of circumstances in a particular case:

> [A]ll law is universal but about some things it is not possible to make a universal statement which shall be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. And it is none the less correct; for the error is [neither] in the law nor in the legislator but in the nature of the thing, since the matter of practical affairs is of this kind from the start.[17]

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there be to believe that the invitation was addressed to the courts rather than to the legislature? (Antonin Scalia, "Originalism, The Lesser Evil," *University of Cincinnati Law Review* 56, no. 4 [1989]: 854) (internal footnotes omitted).

However, as Scalia's critics have pointed out, there are numerous difficulties with his originalist philosophy. First of all, it is unclear that there is any single "original understanding" that can be used to give constitutional language concrete meaning. Law professor Jeffrey Shaman argues that it is an "illusion that the original meaning of [constitutional provisions] has an independent and objective existence that can somehow be magically recovered through diligent study of the past." ("The End of Originalism," *San Diego Law Review* 47 [2010]: 108). The ease with which originalism is flexible enough to accommodate whatever conclusions one wishes to draw from it can be seen in many of Scalia's Supreme Court opinions, where time and again his preferred "original" understanding of the Constitution seems to mesh perfectly with his own conservative political views; see, e.g., Saul Cornell's criticism of Scalia's supposedly originalist interpretation of the Second Amendment in "Originalism on Trial: The Use and Abuse of History in *District of Columbia v. Heller*," *Ohio State Law Journal* 69 (2008): 625–640. A second difficulty with originalism is less philosophical than practical: maintaining an originalist perspective on the guarantees of the Constitution fails to adapt it to the realities of twenty-first-century life. Any "original understanding" (if there is one) of the Commerce Clause, for instance, would hardly accord with the changes in the U.S. economy over two centuries, nor would any original understanding of the national government's role in foreign policy match the realities of the U.S.'s emergence as a global superpower. See Erwin Chemerinsky, *Interpreting the Constitution* (New York: Praeger, 1987), 45ff, for a fuller consideration of this shortcoming of originalism.

16. Aristotle, *The Nicomachean Ethics*, trans. W. D. Ross, Book V, Chapter 10, http://classics.mit.edu/Aristotle/ nicomachaen.5.v.html.

17. Ibid.

Aristotle argues that equity is necessary where a law is poorly formulated or written, and there a judge's role is to ascertain the legislators' intentions and correct their error. "When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by oversimplicity, to correct the omission—to say what the legislator himself would have said had he been present, and would have put into his law if he had known."[18] However, there are also cases where law is written properly, and the problem is not one of correction of an error but of an intrinsic shortcoming of any law. Law, according to Aristotle, can be "defective owing to its universality"[19]—that is, the law has to be written for myriad cases, and the blind application of it to any particular case might result in an unjust outcome.

This was the situation in *Boumediene*, where application of the *Eisentrager* rule would have left the Guantanamo detainees with no fair legal process with which to challenge their detention. The *Eisentrager* rule was well-tailored for the situation after World War II, where the Court wanted to keep the judiciary out of involvement in the treatment of Axis soldiers and officials, for the reasons discussed in the previous chapters. It did not work in the War on Terror, because the Bush administration had crafted its detention policies specifically to exploit the *Eisentrager* rule. The considerations in *Boumediene* had changed because the petitioners were, as previously noted, differently situated than the *Eisentrager* ones. Yet the bright-line rule presented in *Eisentrager* did not take that into account; rather, it stated categorically that foreign

18. Ibid.

19. Ibid.

nationals detained abroad, regardless of the circumstances of their capture, detention, or actual guilt of crimes, were barred from receiving the constitutional protections of habeas corpus.

More generally, the type of bright-line rule making that worked well under the traditional war paradigm did not work when the Bush administration argued that the usual limits on wartime power did not apply. In a traditional war, the temporal and geographic limits on the war, and the defined nature of the "enemy aliens" category,[20] mean that there are clear boundaries about when the Court should and should not countenance aggrandizement of presidential power, including that involving the detention of suspected enemies. However, the Bush (and now Obama) administration claimed that the War on Terror did not present such clear-cut lines; it was a war that would continue indefinitely and was omnipresent across the globe. In such a situation, each member of the Court had to judge at what point the Court needed to push back against presidential overreaching.

The *Sorites* Paradox and Indefinite Detention

For Aristotle, rules could not always factor into decision making all the necessary considerations that might shape what should be done in a given situation. But there is another reason, one that the U.S. Supreme Court faced in trying to adapt its constitutional jurisprudence to wartime exigencies: the type of bright-line distinctions needed by a rule

20. See Chapter III. It might appear that the temporal and geographic limitations on presidential power failed in *Eisentrager* because the Court absolved itself from involvement even though the war had ended. However, the habeas petitions the Court received all came from former "enemy aliens" who were admitted members of the enemy forces that had fought against the United States in the war. There was thus a clear line demarcating a limited group of people the Court would not go out of its way to protect, unlike with the diverse group of people detained in the War on Terror.

are often impossible to develop or agree upon. Many situations in which the law attempts to operate are examples of the sorites paradox, or the ancient Greek "paradox of the heap." The sorites paradox refers to the impossibility of determining on any rational basis, or with any unanimity, at what point small, quantitative differences result in a qualitative change, when the category involved has no clear boundaries.[21] It is often framed as a question of when "imperceptible differences can add up to a perceptible one,"[22] and the classic example—the one that gives the paradox its name[23]—is the question of when the addition of a single grain of wheat or of sand changes a collection of a few grains into a "heap" of grains:

> Does one grain of wheat make a heap? Do two grains of wheat make a heap? Do three grains…. Do ten thousand grains[?] … a heap must contain reasonably many grains. If you admit that one grain does not make a heap, and are unwilling to make a fuss about the addition of any single grain, you are eventually forced to admit that ten thousand grains do not make a heap.[24]

As philosopher Timothy Williamson notes, the sorites paradox can come into play anytime a concept or decision involves differences in degree rather than kind[25]; it can also appear when attempting to ascertain whether a specific case falls under a conceptual category whose boundaries are vague and undefined—for instance, whether someone with only a few hairs qualifies as "bald," or whether a number is close enough to zero to

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21. See, generally, Timothy Williamson, *Vagueness* (London: Routledge, 1996), 8ff; and Richard Tuck, *Free Riding* (Cambridge, MA: Harvard University Press, 2008), 67ff.

22. Williamson, *Vagueness*, 11.

23. "Sorites" is the adjectival form of the noun "soros," which is Greek for "heap." Ibid., 9.

24. Ibid., 8.

25. Ibid., 30.

be considered "small."[26] Richard Tuck points out that the essence of the paradox is that there is no way to use reason to decide at what point a qualitative difference has occurred: "a *judgment* of some kind is going to take place on the part of anyone faced with a sorites."[27] And that judgment will be controversial: different people will think that the boundaries should be drawn at different places, and there is no way to demonstrate that one delineation of the boundary is more correct or appropriate than another, slightly different one. "[T]here is to be no natural answer to the sorites—there simply has to be an abrupt commitment on our part to a particular number (or its equivalent), and we have to recognize that questioning that commitment opens up a *slippery* slope on which we will find no stopping place."[28]

Starting in *Hamdi*, the Court began questioning the temporal limits of wartime detention by the president during the War on Terror. Although "[t]he capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by universal agreement and practice, are important incident[s] of war,"[29] Justice O'Connor agreed with Hamdi that at some point the detention had to be seen as exceeding the president's constitutional and statutory power. "If the Government does not consider this unconventional war won for two generations, and if it maintains during that time that Hamdi might, if released, rejoin forces fighting against the United States, then

26. Ibid., 8, 165; Tuck, *Free Riding*, 67.

27. Tuck, *Free Riding*, 74.

28. Ibid., 73.

29. 542 U.S. at 518 (internal quotation marks and citations omitted).

the position it has taken throughout the litigation of this case suggests that Hamdi's detention could last for the rest of his life."[30]

Justice Kennedy expressed similar concerns in his *Rasul* concurrence, noting that the leeway usually given to the president for unsupervised detention was based on military necessity. Military necessity is evident on the battlefield in a traditional war, where there is a need to deal immediately with war criminals and suspected enemies, but less obvious in a case where a suspect is removed from the area of fighting and kept imprisoned for years on end:

> Perhaps, where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.[31]

At what point would continuing detention become completely unconstitutional? The justices in the majority seemed to think it depended, in part, on the distinction between definite and indefinite detention: whether it was a temporary matter to deal with wartime exigencies, or a permanent condition that mirrored lifetime imprisonment for a criminal but without the judicial process afforded to criminals. The difficulty, however, is that there is no clear point at which finite detention stretches on long enough so as to be considered "indefinite." Kennedy, in his *Rasul* opinion, left unsaid where exactly he would draw the line, and, in dissent, Scalia noted his disapproval of using the definite–indefinite distinction in determining the constitutional question precisely because there is no way to rationally draw the line: "When does definite detention become indefinite?... Justice Kennedy's approach provides enticing law-school-exam

30. 542 U.S. at 520–521.

31. *Rasul*, 542 U.S. at 487–488 (Kennedy, J., concurring in the judgment).

imponderables in an area where certainty is called for."[32] Scalia preferred the *Eisentrager* rule because it drew a clear, unambiguous rule that did not leave anything to the individual justice's judgment. However, for the other justices, it was precisely the "certainty" of the *Eisentrager* rule that was problematic because it established an inflexible rule where some judgment—some consideration of the particulars of the situation—were called for.

The question of when unreviewed military detention becomes excessively long, and therefore unconstitutional, was likely a key factor in convincing the Court to accept and find for the Guantanamo detainees in *Boumediene*. Kennedy did not stress this point in his opinion for the Court, but Justice David Souter, in a concurrence that laid out the broader issues at stake, emphasized the duration of imprisonment of the Guantanamo detainees as a key factor in convincing the Court to intervene and issue such a novel constitutional holding:

> A … fact insufficiently appreciated by the dissents is the length of the disputed imprisonments, some of the prisoners represented here today having been locked up for six years…. Hence the hollow ring when the dissenters suggest that the Court is somehow precipitating the judiciary into reviewing claims that the military … could handle within some reasonable period of time.[33]

Here, the question is framed not as whether the detention had become "indefinite," but whether it was still a "reasonable" length of time. The vagueness concern is the same, though—there is no universal criteria, no objective algorithm, to determine at what point unreviewed detention during wartime goes from being "reasonable" to "unreasonable." Apparently, six years exceeded this "reasonable period of time," but the Court could not elucidate when the line had been crossed. The most that Souter could say was to point to

32. *Rasul*, 542 U.S. at 495 n.4 (Scalia, J., dissenting).

33. *Boumediene v. Bush*, 553 U.S. at 799–800 (2008) (Souter, J., concurring).

"the Court's realistic acknowledgment that in periods of exigency the tempo of any habeas review must reflect the immediate peril facing the country."[34] However, the soritic nature of the situation—at what point justified detention turned into excessive detention—was not amenable to the type of bright-line rule that Scalia favored. And the bright-line rule favored by the Scalia—that the detainees lacked any recourse to the federal court, regardless of how long they were detained without judicial process, and regardless of their actual guilt—was unacceptable to the majority of justices.

Explicating the *Boumediene* Decision

By now it should be evident why the Court felt the need to revisit the *Eisentrager* rule, and why it felt the impetus to do so in 2008, when it accepted the petition from Lakhdar Boumediene. By then, the Court had tolerated an expansive view of presidential detention power for seven years. Because of its desire to avoid making unnecessary claims about the constitutional limits of presidential power, in keeping with the doctrine of constitutional avoidance, it had limited itself to delineating the important role of Congress in wartime detention policies, stressing that the president was intruding on Congress's territory rather than simply exceeding his own authority. However, each time the Court highlighted a role for Congress to play, Congress merely approved the policies already enacted by the Bush administration. And the Military Commissions Act went further than just giving statutory authorization for the type of military commission the Court had struck down in *Hamdan*; by attempting to remove the judiciary's habeas

34. *Id.* at 800.

jurisdiction over Guantanamo, it was effectively placing executive actions at the detention facility outside of any third-party scrutiny.

This is where the Court changed its separation-of-powers focus from looking at the balance of power between the political branches to the balance between itself and Congress. The key concern was no longer that the executive branch was stepping into an area that was the prerogative of the legislature; rather, it was that the executive branch was acting outside the constitutional limits on its power and had gained the power to do so only because Congress was exceeding its own authority by stripping the Court of its habeas jurisdiction, which historically has served to limit Executive power by ensuring that imprisonments are in accordance with the law. The MCA did not legislate in such a way as to provide the legal groundwork for holding the detainees at Guantanamo; it simply attempted to eliminate the judicial mechanism for testing and challenging the legality of the detention.

Kennedy's opinion for the Court frames this central issue in *Boumediene* as one of "separation of powers," without elaborating that he was, in fact, looking at a much different separation-of-powers concern than in the two previous Guantanamo cases, where the issue was the balance between the political branches. The justification that Kennedy gave for why the detainees had standing—that "foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles"[35]—was similarly opaque, since the case he cited as support, *INS v. Chadha*,[36]

35. *Boumediene,* 553 U.S. at 743 (majority opinion).

36. 462 U.S. 919 (1983).

dealt with the constitutionality of a legislative veto of executive-branch decisions, another case involving the balance between the two elected branches.

It is here that we can appreciate the importance of seeing habeas not merely as vindicating of other enumerated individual rights, but as creating a "structural right" by serving as a limitation on governmental power. The Court had never held that the detainees had enumerated constitutional rights that could be vindicated through habeas corpus, nor, for the reasons discussed below, is the Court likely to so hold. By contrast, the Court recognizes how enforcement of certain structural provisions in the Constitution can create the equivalent of individual rights. The revocation of the Court's habeas jurisdiction had created an injury to the detainees—eliminating the mechanism through which they could challenge their detention—but the Court could not hold that they had standing because an enumerated right had been violated. Since the structural rights provide protections by restraining the federal government, the way in which the Court could find standing was, as it had in *Chadha*,[37] to say that foreign nationals injured by the government's overstepping its authority have standing to sue: not standing to enforce an enumerated right, but standing to enforce the structural separation-of-powers scheme of

37. In *Chadha*, a foreign national who had overstayed his visa was about to be deported by the INS when an immigration judge suspended the deportation order. The federal Immigration and Nationality Act (INA) gave to the attorney general—or someone acting under the authority of the attorney general, such as an immigration judge—discretion to suspend the deportation of an eligible foreign national, but made such decisions subject to a legislative veto. When the House passed a resolution overturning the judge's decision, Chadha filed suit, claiming that the legislative veto was unconstitutional because it violated the Article I procedures for how Congress must enact laws. The Supreme Court ultimately agreed with Chadha and ruled the legislative veto unconstitutional. It considered and dismissed several justiciability issues, including questions raised about the PQD, the Court's appellate jurisdiction, and whether Chadha's situation presented an Article III "case or controversy." The Court specifically rejected the notion that Chadha lacked standing, finding that, though the case was mainly about the separation of powers between the president and Congress, he had met the main requirements by demonstrating an "injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury," since nullification of the legislative veto would prevent him from being deported. *Chadha*, 462 U.S. at 935, (quoting *Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. 59, 79 (1978)).

the Constitution, which exists to protect a generalized right to liberty.

A version of this argument had already been presented in a dissenting opinion when the D.C. Circuit Court heard the *Boumediene* case. A panel for the Circuit Court held, 2-1, that *Eisentrager* barred the Guantanamo detainees' habeas suits. The panel found that the MCA properly withdrew the Court's jurisdiction because an unconstitutional suspension only would have occurred had the detainees had a constitutional right to habeas in the first place. However, finding that the *Eisentrager* rule applied to Guantanamo, the panel found that the withdrawal of jurisdiction was within congressional power.

Judge Judith Rogers dissented, arguing that the panel majority "fundamentally misconstrues the nature of suspension: Far from conferring an individual right that might pertain only to persons substantially connected to the United States … the Suspension Clause is a limitation on the powers of Congress."[38] To make the point that the Suspension Clause alone is sufficient to give the detainees a constitutional guarantee of access to the courts to gain their freedom, she accepted the majority's argument that the detainees had no constitutional rights, but claimed that the lack of rights was immaterial. What mattered, she argued, was that the Suspension Clause takes away from Congress the power to limit the judiciary's habeas jurisdiction to exclude cases that, at common law, would have been properly the subject of a habeas petition. Since, in her view, the MCA did exactly that, the Suspension Clause rendered it unconstitutional, and the statutory right to habeas that the detainees possessed in light of *Rasul* and *Hamdan* was still valid. There was not, in other words, a constitutional structural right to habeas but,

38. *Boumediene v. Bush*, 476 F.3d 981, 994–995 (2007) (Rogers, J., dissenting).

rather, a structural limitation on Congress that prevented it from withdrawing the statutory right to habeas that existed prior to the MCA.

Rogers' argument failed to gain traction in the Circuit Court because she drew too strong a dichotomy between a limitation on Congress and an "individual entitlement"[39] or constitutional right belonging to those affected by congressional action. Rogers' overall point was valid—an *enumerated* right to habeas in the Constitution is not necessary to strike down the MCA as long as the Suspension Clause is in operation—but she framed this to suggest that the Guantanamo detainees therefore have no constitutional right to habeas—only a statutory one (albeit one that Congress cannot eliminate). A more precise rendering of this argument would have pointed out that the detainees do have a right, but not an enumerated one; rather, it is a structural one that flows from the restraint that the Suspension Clause places on Congress. Rogers seemed to think that *Eisentrager* stood for the proposition that "the Constitution does not afford rights to aliens"[40] detained overseas to challenge their military detention, and thus she saw the need to reject a rights-based argument altogether. However, this is too broad a reading of *Eisentrager*, since *Eisentrager* only dealt with the question of a Fifth Amendment due-process right, not a subsidiary structural right.

This may sound like semantics, since a structural right is not an individual right in the traditional sense—that is, an enumerated one—but the indirect product of a duty on the branches of the federal government to respect constitutional limits, and Rogers' argument was exactly that: that (a) Congress had a duty to respect the Suspension Clause,

39. *Id.* at 995.

40. *Id.* at 1011.

(b) the MCA violated the Suspension Clause, (c) the MCA was therefore void, and (d) without the MCA, the detainees retained the statutory habeas rights recognized in *Rasul.* The shortcoming of Rogers' presentation of this argument was that she failed to draw a strong enough connection between the constitutional violations and the detainees themselves, who appeared, at first glance, to have no legal interest in the balance of power among the three branches. Put another way, Rogers failed to show why the transgression of the separation of powers created an injury to the detainees that would grant them standing in court if, as she argued, there were no individual rights at stake. By so vehemently rejecting the connection between rights and structural limits, she severed the apparent legal relevance of the Suspension Clause issue to the detainees. The answer is that, as the Supreme Court had observed, a violation of the separation of powers can create a "concrete injury"—a necessary prerequisite for standing—because of the close connection between limits on the federal government and the prevention of arbitrary rule: that is, the protection of a generalized right to liberty.

Ironically, it was Judge A. Raymond Randolph, in the majority opinion for the D.C. Circuit panel, who pointed out the inherent connection between constitutional limitations on congressional power and individual rights. "[T]he dissent offers the distinction that the Suspension Clause is a limitation on congressional power rather than a constitutional right," noted Judge Randolph. "But this is no distinction at all. Constitutional rights are rights against the government and, as such, *are* restrictions on governmental power."[41] And it is again Randolph who pointed out that constitutional provisions such as the Ex Post Facto Clause and the Suspension Clause, by their very nature, create subsidiary

41. *Id.* at 993.

rights.[42] Ultimately, Randolph drew the wrong conclusion—that the detainees have no rights—because he held that the Suspension Clause didn't apply to the detainees, but he recognized why, if it did apply, it would confer an individual right on the detainees. By contrast, Rogers reached the correct conclusion—the Suspension Clause applied and thus rendered the MCA unconstitutional—but failed to present a convincing argument about why it should apply. Importantly, she did not explicitly frame the case as concerning the separation of powers. The Supreme Court later did, which allowed it to avoid any discussion of enumerated individual rights[43] but still find that the detainees have standing to sue by arguing that it had previously, in *Chadha*, recognized the right of noncitizens to sue to enforce the separation of powers when a governmental power grab affects their liberty. The right to go to court, in this case, is tantamount to recognizing that a justiciable violation of an individual's right to liberty may have occurred. This is why the Court has recognized such an unusual doctrine as giving noncitizens—who arguably have no real interest in a foreign government's internal workings or their accord with constitutional limitations—the right to use the courts to enforce the constitutional separation of powers.

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42. *Id.*

43. Kennedy does explicitly say that the "Clause protects the *rights* of the detained by affirming the duty and authority of the Judiciary to call the jailer to account," *Boumediene,* 553 U.S. at 745 (emphasis added), but he never elaborates on what "rights" these are. It is likely, in this context, that he was giving a generalized account of how habeas works, not a specific analysis of how it would help the detainees at Guantanamo. Alternatively, he may have been referring to the generalized right to liberty (and concomitant right to be free from arbitrary detention) protected by the constitutional limitations on the political branches.

The Uses and Abuses of History

The disagreement between Rogers and Randolph was not merely over whether to interpret the Suspension Clause as a right or a restriction. Rather, it dealt primarily with whether the Suspension Clause was applicable at all to a location like Guantanamo, outside the geographic territory of the United States. The differing views reflect the considerable confusion and uncertainty about what the common law writ of habeas corpus required. The Supreme Court had ruled in *St. Cyr* that, "at the absolute minimum, the Suspension Clause protects the writ as it existed in 1789,"[44] when the first Judiciary Act, including its statutory guarantee of habeas, was enacted. Ever since *St. Cyr*, courts dealing with questions of a constitutional right to habeas have argued extensively about the particulars of habeas as understood in the eighteenth century: who had access to the writ, whether the writ reached foreign territories, and why the courts back then might not have viewed the writ as extending globally.

The need for lower courts to carefully follow that Supreme Court precedent lead to a situation where they were unable to reach conclusions that better reflected the overarching point of that holding (that is, the principle rather than the rule). The reason that the Court referenced 1789 was to emphasize that Congress only has the power to expand the writ, not restrict its reach to become less inclusive than it was at the time of the country's founding.[45] It was not to suggest that the details of how habeas was understood in 1789 were dispositive of every question of how to apply the Suspension

44. *St. Cyr*, 533 U.S. at 301 (internal quotation marks omitted).

45. The Judiciary Act of 1789 is referenced with the understanding that the First Congress would have intended its statute governing habeas to reflect the understanding of habeas's purpose and reach that, two years earlier, was written into the Constitution.

Clause. Nor should it be: the expansion of the reach of the writ over time suggests that restrictions viewed as important, because of practical limitations[46] or otherwise, in the eighteenth century might no longer apply. Far more important is what the Framers aimed to accomplish by codifying the availability of habeas in the Suspension Clause and how the clause reflects the underlying concern with arbitrary imprisonment.

Nonetheless, since lower courts are bound by the Supreme Court's holdings, both Judge Randolph and Judge Rogers engaged in detailed historical analyses of the writ's availability in analogous situations in the eighteenth century. The majority and dissenters in the Supreme Court also sparred over the historical reach of the common law writ, both in *Rasul* and in *Boumediene*. However, since Guantanamo is jurisdictionally unique, no one was able to provide a clear-cut answer as to whether the common law writ as understood in 1789 would have applied to Guantanamo.

Justice Kennedy wisely moved away from viewing the historical analysis as dispositive or even particularly relevant. Although he summarized the available evidence on the historical reach of the writ at common law, he ultimately concluded that the majority "decline[s] … to infer too much, one way or the other" from it.[47] In part he based this on the lack of clear historical guidance: "Diligent search by all parties reveals no certain conclusions"[48] about the applicability of the common-law writ to a place like Guantanamo, "given the unique status of Guantanamo Bay and the particular dangers of

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46. "[W]e cannot disregard the possibility that the common-law courts' refusal to issue the writ [in certain circumstance] was motivated not by formal legal constructs but by what we would think of as prudential concerns." *Boumediene*, 553 U.S. at 749.

47. *Id. at* 752.

48. *Id.* at 746.

terrorism in the modern age."[49] However, he also noted that the reach of the common law writ was supposed to serve as a floor, not a ceiling, to the availability of habeas. "The Court has been careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ."[50] More importantly, he emphasized that the particulars of the writ in 1789 do not answer the question about whether it would uphold the underlying purpose of the writ when it was codified: to restrain the political branches, in recognition of how governmental overreaching threatens individual freedom.

Kennedy's opinion expressed great concern about the implications of holding, as the dissenters would, that the writ of habeas corpus doesn't "run" to Guantanamo Bay. As discussed in earlier chapters, the writ has historically served as an important limitation on executive power; and the Court has historically used the writ—when it had the necessary political capital—to assert its right to challenge Executive overreaching. Kennedy was therefore not being overly dramatic when he was saying that upholding the *Eisentrager* rule would allow "the political branches to govern without legal constraint."[51] In moving toward talking broadly about the "political branches" rather than the Executive, Kennedy was also acknowledging that congressional approval of the president's plans was insufficient to make them legitimate. It was outside Congress's constitutional power to bless an extension of the president's powers outside constitutional limits by taking away the Court's power to restrain the executive to act according to established law. Although

49. *Id.* at 752.

50. *Id.* at 746.

51. *Id.* at 765.

the Court had previously given great deference to Congress's determination of how habeas should function, looking to the federal habeas statute for guidance on how to interpret the Suspension Clause, the sharp constricting of the scope of habeas through the MCA led the Supreme Court to recognize that it had to look to a different source of guidance: the purpose of the writ and its history as an ever-developing tool to protect individual liberty in the face of governmental excess.

The "Functional Test"

In repudiating the *Eisentrager* rule, at least as applied to the Guantanamo detainees, Kennedy did not hold that habeas extends to every person the United States has detained throughout the world. For the reasons discussed above, Kennedy purposefully avoided issuing *any* strict rule about how the Suspension Clause should be applied extraterritorially. Rather than look solely at the citizenship and geographic location of the detainees involved, he held, the judiciary should consider three factors:

> (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.[52]

Enumeration of these three factors is so in keeping with the functionalist method of constitutional interpretation outlined above that Scalia even termed it a "'functional' test."[53] Unlike a formalistic approach, the functionalist one allows future courts great leeway in determining where and when the Suspension Clause's protections should

52. *Id.* at 766.

53. *Boumediene*, 553 U.S. at 838 (Scalia, J., dissenting).

apply. The third prong of the test—taking into account "practical" circumstances—is particularly well-suited to the War on Terror: the Court does not want to give the political branches carte blanche to do as they see fit, but it also does not want to impede important military efforts to deter future terrorist attacks and imprison those responsible for planning them.

Kennedy's opinion, in keeping with his functionalist approach, also does not outline the particular procedures that future courts should follow in habeas hearings for the detainees. After analyzing the CSRT procedures discussed in the previous chapter, he found that they do not provide a fair chance for detainees to show their innocence of terrorism accusations, nor does the statutorily defined process for appeals of CSRT verdicts give the appeals court enough power to overturn questionable findings.[54] However, he did not say what a sufficient judicial process *would* look like in these cases. The difficulty of issuing any rule for extraterritorial habeas cases that would not backfire later on led Kennedy to leave those determinations to the lower courts. In fact, his opinion is so vague on this point that it points to the possibility that many different types of hearings would be appropriate, depending on the particular circumstances of capture and detention.

The part of Kennedy's opinion that has come in for the greatest criticism, both by the dissenting justices and by commentators, was his attempt to interpret *Boumediene* as in keeping with the approach of *Eisentrager*, distinguishing rather than overruling it. Why did Kennedy's opinion try to construe *Eisentrager* as a "functionalist" opinion rather than acknowledging its formalistic approach? That is, why not just overrule *Eisentrager*

54. *Id*. at 771–795.

outright? The Court faced the difficulty that the holding is a fifty-year-old precedent that "has engendered considerable reliance on the part of [the] military"[55] and has formed the basis of Supreme Court and lower-court decisions about the rights of foreign nationals abroad in U.S. courts.[56] The need for stability and reliability in the law cautioned against overruling outright such a precedent.

Justice Kennedy has also expressed support for some of the *Eisentrager* reasoning. Kennedy agrees with the general sentiment in *Eisentrager* that there are limits to the Constitution's extraterritorial applicability. "[T]he Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory," he wrote in a 1990 opinion.[57] Nor, for that matter, does Kennedy think that all constitutional protections extend to everyone in the world. In his concurrence in *Hamdan*, for instance, Kennedy said that Congress could authorize the president to try foreign nationals abroad accused of terrorism in military tribunals that did not meet all the fair-trial guarantees of the Bill of Rights.[58]

Instead of either agreeing or disagreeing with the entirety of *Eisentrager*, Kennedy attempted to separate some of the opinion's reasoning from its formalistic holding. In particular, Kennedy, in keeping with his pragmatic approach to constitutional

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55. *Boumediene*, 553 U.S. at 842 (Scalia, J., dissenting).

56. See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (reaffirming *Eisentrager*'s rejection of the extraterritorial applicability of the Fifth Amendment and relying on *Eisentrager* to reject the extraterritorial applicability of the Fourth Amendment); *Pauling v. McElroy,* 278 F.2d 252 (D.C. Cir. 1960) (citing *Eisentrager* to dismiss suit, on standing grounds, brought by foreign nationals abroad to stop United States from detonating nuclear weapons).

57. *Verdugo-Urquidez*, 494 U.S. at 275.

58. *Hamdan*, 548 U.S. at 636 (Kennedy, J., concurring).

interpretation, seems to accept Justice Robert Jackson's view that the rights of aliens fluctuate depending on their level of connection with the United States. "The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society," Jackson wrote in *Eisentrager*.[59] For Jackson, "lawful presence in the country"[60] was the necessary predicate of any relationship between foreign nationals and the United States that could confer on them constitutional rights. Kennedy, however, appears to believe that a juridical relationship between the two can begin in other circumstances—for instance, if the United States apprehends a nonresident foreign national, detains him abroad, and asserts the right to continue that detention indefinitely, without any sort of trial. Although Kennedy does not think a foreign national in such a position would be entitled to all or perhaps even most of the constitutional rights given to citizens,[61] and thus would not want to hold that the Fifth Amendment Due Process Clause applied in such circumstances, the basic right to challenge arbitrary imprisonment—to request judicial evaluation of an imprisonment to ensure it is in accordance with the law— is so fundamental to American law and constitutionalism, and so foundational to the notion of individual liberty embodied by the writ of habeas corpus in the Anglo-American legal tradition, that, for Kennedy, the Suspension Clause, in keeping with the idea that it provides a structural right, can be interpreted as providing this minimal protection of liberty even for someone who has no other constitutional protections.

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59. *Eisentrager*, 339 U.S. at 770.

60. *Id*.

61. In his concurrence in *Hamdan* (548 U.S. at 636), Kennedy said that Congress could authorize the president to try nonresident foreign nationals accused of terrorism in military tribunals that did not meet any of the fair-trial guarantees of the Bill of Rights.

Instead of outright overruling *Eisentrager* and throwing into disarray the Court's entire jurisprudence on the rights of foreign nationals abroad, Kennedy attempted to adapt those aspects of *Eisentrager* with which he agrees to his own views about habeas corpus and the power of the Court. Equally as important, Kennedy tries to avoid drawing the type of bright-line rule in *Eisentrager.* As Kennedy recognized, the situation of detainees is so context dependent that it is impossible to draw a bright-line rule that will capture the necessary considerations in each case. Just as with the *Eisentrager* rule, any further rule about the rights of detainees would likely be overinclusive, underinclusive, or simply inapplicable to many circumstances. Moreover, the Court could not predict where the War on Terror would lead and under what circumstances it would need to intervene again. To issue another bright-line rule would risk yet another confrontation between precedence and inconvenient real-world circumstances. Thus, the Court dispensed entirely with rule making and instead developed its "functional test."

As the criticism that Kennedy received, even from supporters of the outcome, indicates, his argument was less than convincing. Instead of acknowledging the discrepancy between his functionalist reasoning and *Eisentrager*'s formalism, he attempted to construe *Eisentrager* as a functionalist opinion concerned with "practical considerations."[62] However, it is hard to see how *Eisentrager,* which states that an "alien's presence within its territorial jurisdiction"[63] is necessary for the Court to recognize his possessing any judicially enforceable constitutional rights, could be interpreted as holding that "questions of [the extraterritorial application of constitutional

62. See *Boumediene*, 553 U.S. at 753ff.

63. *Eisentrager*, 339 U.S. at 771.

rights] turn on objective factors and practical concerns, not formalism," as Kennedy described it.[64] *Eisentrager* was an exemplar of formalism, and the ease with which the Bush administration manipulated the holding to escape judicial scrutiny shows the folly of using such inflexible rules in habeas jurisprudence. The Court was right to reject *Eisentrager*'s formalism and adopt a "functional approach"[65] for "determining the reach of the Suspension Clause,"[66] but it is (unfortunately) hard to disagree with Justice Scalia's claim that "*Eisentrager* nowhere mentions a 'functional' test, and the notion that it is based upon such a principle is patently false."[67] Instead of trying to portray *Eisentrager* as something it was not, Kennedy should have acknowledged more forthrightly the problem with the *Eisentrager* rule: that it may have been appropriate for the circumstances of World War II detainees, but not for those in the War on Terror. There is no reason his opinion could not have outright overruled *Eisentrager*'s categorical bar on habeas for nonresident foreign nationals, while nonetheless upholding its general principle that the Constitution is limited in its extraterritorial application. In fact, this is precisely why it is important to view the Suspension Clause as creating a structural right: it allows anyone detained without cause by the U.S. government to challenge his or her detention, gaining standing based on separation-of-powers principles, while preventing the Court from having to adjudicate endless claims about Bill of Rights violations around the world.

Scalia, the Court's major proponent of formalism in constitutional interpretation,

64. *Boumediene*, 553 U.S. at 764.

65. *Id.*

66. *Id.* at 762.

67. *Boumediene*, 553 U.S. at 838 (Scalia, J., dissenting).

unsurprisingly did not see any problem with the *Eisentrager* approach, and his dissent in *Boumediene* strongly criticizes the majority for backing away from *Eisentrager*'s clear holding that "the privilege of habeas corpus does not extend to aliens abroad."[68] "The rule that aliens abroad are not constitutionally entitled to habeas corpus has not proved unworkable in practice,"[69] Scalia claimed in defense of *Eisentrager*. But, for the majority on the Court, the idea that the government could assert an unlimited, discretionary power to imprison people indefinitely without trial, simply by placing them outside sovereign U.S. territory, was not merely "unworkable," but represented a striking failure in its jurisprudence. The Suspension Clause is supposed to protect against this notorious form of abuse of governmental power—arbitrary imprisonment—"by affirming the duty and authority of the Judiciary to call the jailer to account."[70] By allowing the political branches to escape judicial scrutiny at Guantanamo by using technicalities about sovereignty, the *Eisentrager* precedent was doing more than just granting some latitude to the president and Congress to conduct foreign affairs; it was providing a means through which, as Kennedy famously put it, "the political branches have the power to switch the Constitution on or off at will."[71]

68. *Id*. at 841.

69. *Id.* at 842.

70. *Boumediene,* 553 U.S. at 745 (majority opinion).

71. *Id*. at 765.

Conclusion: Saying "What the Law Is" at Guantanamo

The previous chapters have aimed to show why the Court was correct to intervene and defend the rights of foreign nationals detained at Guantanamo Bay, even if that meant revising its World War II–era jurisprudence on the rights of foreign nationals abroad. In the Introduction, I noted that this dissertation would, in particular, attempt to disprove three claims made by opponents of the Supreme Court's intervention in the War on Terror: (1) that the Court should abstain from involvement in foreign policy, an area outside its constitutional jurisdiction and institutional expertise; (2) that foreign nationals abroad should be categorically excluded from habeas corpus; and (3) that the unique nature of the War on Terror meant the Court should grant virtually unfettered latitude to the executive branch to deal with national-security concerns that don't implicate the rights of citizens or domestic residents. By now, it should be clear that each of these three claims fails. As Chapters II and III document, the Court has an important role to play in policing the separation of powers, even if it implicates foreign policy. The Constitution does not exclude foreign policy from the types of cases and controversies under the judiciary's purview, and the acquiescence of the political branches and the general public to the institution of judicial review indicates no reason to except foreign policy from its domain. Furthermore, the judiciary has, throughout the War on Terror, shown an awareness of the types of cases—specifically, those dealing with individual liberty—in which it should intervene, and the reasons why it should restrain itself in the face of other types of foreign policy issues. The emphasis that the Framers placed on individual liberty, detailed in Chapter I, shows why the Court was right to involve itself in the Guantanamo cases and in *Hamdi*, where the Executive claimed a right to detain

indefinitely without judicial process foreign nationals and a U.S. citizen, respectively. The Court, notably, did not ever dictate that any individual should be freed; rather, it only outlined the process that needed to be followed to ensure that detentions were justified, rather than arbitrary.

Judicial Review and Judicial Minimalism in the War on Terror Cases

The intervention of the Court was also necessary to respond to particularly broad claims of power by the political branches in which they suggested essentially unfettered power to act abroad. Even if the Constitution does not fully "follow the flag," the Court recognized the danger of saying that constitutional limitations on the political branches do not apply at all when the government acts abroad. The Court has been particularly sensitive to the needs of the political branches to respond to emergencies, while holding that, where there are no exigent circumstances, normal constitutional limitations on those branches apply. The War on Terror, in that respect, may suggest a need for some innovation—such as adapting the writ of habeas corpus to the unique circumstances of the Guantanamo detainees—but it cannot require a permanent suspension of normal constitutional practices, including judicial oversight of executive detention. This is even the case when it comes to detainees with no previous connection to the country. The idea that the Court should categorically exclude foreign nationals abroad from judicial protection has never been normatively defensible, and it shields even the most egregious abuses of power by the government from judicial correction. Denying foreigners abroad access to the courts may have made sense as a practice during the World War II era, given the particular circumstances of the Axis detainees and the Court's institutional

power at the time, but the contemporary Supreme Court was wise to see that those context-specific factors no longer apply and that it had strong reasons to intervene to end indefinite detention without judicial process when it was capable of doing so.

At the same time, the Supreme Court's efforts throughout the War on Terror cases display the hallmarks of judicial restraint discussed in Chapter II. The Court has recognized that, especially during times of armed conflict, the political branches need to be given latitude to conduct military operations abroad. This can be seen in at least five different ways.

First, the Court invoked its discretion over certiorari and other maneuvers to avoid unnecessarily having to make decisions in tough situations. In *Boumediene*, the Court held off, at first, in granting certiorari, and only reversed its decision when it became clear that its intervention was the only way to give the detainees any fair opportunity to show their innocence. Similarly, in the *Padilla* case, the Court dismissed the case on jurisdictional grounds, pushing off any substantive decision making until a later date; as it likely hoped, the case became moot before the Court had to consider it again. As discussed in the Postscript, the Court has similarly been hesitant to grant certiorari in post-*Boumediene* detainee cases, though that has reached a point where the Court needs to intervene if it wants *Boumediene* to continue to hold sway.

Second, the Court has focused only on cases where judicial intervention is necessary to remedy ongoing injustice; it has abstained from involvement in cases asking for redress of previous wrongdoing by government officials. As discussed in the Postscript, the lower courts have (somewhat unfortunately) repeatedly dismissed civil suits against government officials accused of being involved in torture and other detainee

mistreatment, and the Supreme Court has refused to grant certiorari in any of those cases. Thus, while the Court has recognized that it has a role to play in ending continuing detentions, it has decided not to get involved in questioning—or allowing others to question in a judicial forum—the decisions of executive branch officials during the aftermath of 9/11.

Third, the Court adhered to its doctrine of constitutional avoidance in both *Rasul* and *Hamdan*. In *Hamdan,* it was particularly difficult to do so because it required a somewhat counterintuitive reading of the jurisdiction-stripping provision of the Detainee Treatment Act to read it as inapplicable to Hamdan's case. Nonetheless, the Court found that approach preferable to having to rule that federal law violated the Suspension Clause. The Court only took that drastic step once Congress had amended the habeas statute yet again to oust the Court's jurisdiction over all habeas cases, "without exception,"[1] coming from the Guantanamo detainees. The Court's emphasis on the conflict between presidential action and federal law also allowed it to focus the cases not on constitutional questions, but on statutory interpretation. The Court throughout avoided any discussion of whether, as Bush administration officials claimed early on in the War on Terror, the president has inherent constitutional powers to engage in actions such as unlimited detention during times of armed conflict. Rather, it found that, in areas in which Congress had already legislated, "the Executive is bound to comply with the Rule of Law."[2]

Fourth, the Court closely kept to the specific facts in each case, deciding issues on general *principles* but refusing to promulgate wide-ranging *rules* that could unnecessarily

1. Military Commissions Act of 2006, § 7(b).

2. *Hamdan*, 548 U.S. at 635.

predetermine the outcome of issues that were not yet before it. In *Hamdi*, the Court said that some process was "due" to citizen-detainees captured on the battlefield during wartime, but it refused to outline in detail what that process was. Similarly, the functional test in *Boumediene* did not address many of the specifics that lower courts would have to grapple with—such as whether hearsay was permissible in a habeas hearing, what burden of proof the government would have to meet to hold someone during wartime, and how courts should balance security concerns with the demands of fair judicial process—leaving those questions for the lower courts or a future Supreme Court case.

Fifth, when the Court ultimately had to decide a constitutional question in *Boumediene*, it did so on the basis of the Suspension Clause, rather than the Bill of Rights. The case would have been more straightforward had the Court simply held that the Due Process Clause of the Fifth Amendment applied to the Guantanamo detainees, but, as discussed below, that would have represented a drastic change in the Court's jurisprudence. The Court instead embraced the narrowest ground on which it could decide these cases: that the Suspension Clause required that the detainees be granted at least minimal judicial process to ensure they were not being mistakenly detained. That holding was sufficient to settle the cases at hand, but it means that the detainees only receive a habeas hearing, not the more-extensive rights that would fall under the rubric of due process.

Guarding the Separation of Powers

The invocation of separation of powers, statutes, and the Suspension Clause, rather than constitutional due process, was also important insofar as it kept the focus of the War on

Terror cases on the limitations of the powers of the political branches rather than on the rights of detainees. The outcome of *Rasul* and *Boumediene* ended up being the same as a due-process-based approach would have provided—the detainees were granted a right to challenge their detentions—but the Court was also able to make the broader point that the expansive claims of executive power by the Bush administration were unfounded. In *Boumediene*, the Court also turned its focus to the constitutional limitations on Congress, emphasizing that, even though statutory authorization could accomplish much, it could not curtail the judiciary's right to inquire into the justification of executive detentions through the writ of habeas corpus. The *Boumediene* discussion virtually ignores the detainees themselves, emphasizing, above all, that the Military Commissions Act violated the separation of powers by attempting to free executive detentions from judicial oversight. Thus, even though the primary effect of the War on Terror cases was to help free detainees who were mistakenly captured, the Court was able to make two broader points: that "a state of war is not a blank check"[3] when it comes to the behavior of the political branches, and that the judiciary has an important role to play in policing the limits of the powers of the political branches, even during wartime.

The importance of the limitations on the political branches in protecting individual liberty explains why the Supreme Court has held that even foreign nationals abroad can sue to enforce the constitutional separation of powers. On its face, this is a curious doctrine: it seems to suggest that any individual—indeed, in the case of the Guantanamo detainees, even one who has been accused of wanting to attack America—has a sufficient interest in the proper functioning of the U.S. government to have standing to challenge

3. *Hamdi*, 542 U.S. at 536.

actions by Congress or the president that contravene the constitutional structure. Yet once the connection between constitutional limits and individual liberty is understood, this no longer seems mysterious. The detainees could challenge erroneous detentions, and thus gain their freedom if they were innocent of any crime, even without explicit constitutional rights, as long as the courts had the power to evaluate the legality of any detentions and order release if necessary.

In finding that the detainees could invoke the separation of powers as a basis on which to challenge the Military Commissions Act, Justice Kennedy's opinion in *Boumediene* also demonstrates how the Court can adjust its justiciability doctrines to hear cases it feels necessary to hear, while avoiding those that would place it in a difficult situation in relation to the other branches. Kennedy claimed that the reason the detainees had standing was that "the Constitution's separation-of-powers structure, like the substantive guarantees of the Fifth and Fourteenth Amendments, see *Yick Wo v. Hopkins,* protects persons as well as citizens" and thus "foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles, see, *e.g., INS v. Chadha.*"[4] However, neither of the two cases he cites as justification go that far. In *Yick Wo*,[5] the Supreme Court held that the Fourteenth Amendment "was not confined to the protection of citizens"; however, it did not hold that the reference to "persons" in the Amendment protected people throughout the world, but only individuals (whether

4. *Boumediene*, 553 U.S. at 743 (internal citations omitted). The reference to the "privilege of litigation" refers back to the dispute in *Rasul* about how to interpret *Eisentrager*'s claim that "that the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection." *Eisentrager,* 339 U.S. at 777–778. As noted on page 155, the Court in *Rasul* said this was an incorrect statement of the law and effectively overturned that part of the *Eisentrager* holding.

5. 118 U.S. 356 (1886).

citizens or foreign nationals) "within the territorial jurisdiction" of the Court.[6] In similar cases, the Court has held that other constitutional protections apply equally to citizens and resident nationals,[7] but the Court has never held that "persons" encompasses noncitizens outside the United States. In fact, the *Eisentrager* Court strongly rejected the notion that "the Fifth Amendment confers rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses," finding that the term *persons* only encompassed those within U.S. borders,[8] and that part of the *Eisentrager* holding has never been overturned. The *Chadha* Court found that a foreign national had standing to challenge separation-of-powers violations under certain circumstances, but, since Chadha was a resident national who had been legally admitted under a student visa, the case does not touch upon the central question of whether a foreign national *abroad* would similarly have standing. To have standing, a detainee would have to have a judicially cognizable claim, including "hav[ing] suffered an 'injury in fact'—an invasion of a legally protected interest."[9] If the Court had wanted to avoid *Boumediene*, it could have pointed out that the detainees have no explicit constitutional rights, nor can they be said to have a "legally protected interest" in the proper functioning of the U.S. government, as someone living within the United States, under the daily control of the U.S. government, would have.

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6. *Id.* at 369.

7. See, e.g., Wong Wing v. United States, 163 U.S. 228, 238 (1896), holding that "all persons within the territory of the United States are entitled to the protection" of the Fifth and Sixth Amendments; Japanese Immigrant Case, 189 U.S. 86 (1903), clarifying that even immigrants here illegally have due-process rights.

8. *Eisentrager*, 339 U.S. at 783.

9. *Lujan*, 504 U.S. at 560–561.

Instead, though, Kennedy recognized that the standing requirement should be expanded to include not only those who have explicit rights, but those who would be adversely affected by governmental power in excess of the Constitution. This can be conceptualized in terms of structural rights: the rights created by limitations on the federal government and the separation of powers provide legal protection to anyone who comes under the government's authority, as long as the judiciary can enforce those structural provisions, thus creating the "legally protected interest" required by standing doctrine. Kennedy does not cite any source for this expansion of separation-of-powers-based standing to encompass not only domestic foreign nationals (as in *Chadha*) but also those abroad, but it is in keeping with how the Court has, at times, relaxed standing, or broadened its reach, to give the judiciary discretion over which cases to hear.[10]

Limited Government: A Clarification

My argument about the importance of the constitutional limitations on the federal government's power might be misinterpreted as suggesting that any actions by the federal government not explicitly authorized by the Constitution are a threat to individual liberty. I am not, however, making such a broad claim: that is, I am not saying that, in all circumstances, the federal government's constitutional grants of power must be kept to as narrow a construction as possible in order to avoid tyranny. It is true that the Framers greatly feared that the federal government would aggrandize itself at the expense of the states' power and individual rights, and thus they restricted the federal government to enumerated powers, as explicitly stated in the Tenth Amendment to the U.S.

10. Bickel, *Least Dangerous Branch*, 119–133; Richard J. Pierce, Jr., "Is Standing Law or Politics?" *North Carolina Law Review* 77 (1999): 1741–1790.

Constitution.[11] This has lent itself to the argument, frequently made by some conservative legal scholars, that any action by the federal government is illegitimate unless the power to act is explicitly conferred by constitutional text. In this view, the "burden [is] on Congress to justify the propriety of its actions by pointing to the enumerated power it is granted," [12] and it is not sufficient that a broad construction of the textual language *could* accommodate a particular action if a narrower construction, supposedly more consistent with the Framers' understanding of the constitutional grant of power, would suggest otherwise.

However, one need not go that far. The argument I am making here is predicated on two clear principles of constitutionalism: (1) that the separation of powers is important to the federal government's structure, and (2) that certain *explicit* limits on congressional power (such as the Suspension Clause) are included in Article I because they relate to governmental powers that, historically, have been abused and put toward tyrannical ends. My argument does not, therefore, speak to the debate about how to interpret the more nebulous clauses of Article I, such as the Commerce Clause; nor does it involve the debate about whether congressional grants of power written in vague language should be viewed having a changing meaning over time, as the federal government has come to play a more important role in regulating national issues. The denial of the power to bless arbitrary imprisonment cuts at the heart of what the Framers considered individual liberty, and the separation of powers was designed as a structural barrier to the

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11. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

12. Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton, NJ: Princeton University Press, 2004), 317; cf. the discussion of originalism in Chapter VII, footnote 15.

accumulation of power that could lead to arbitrary rule. The same cannot be said about other areas of federal authority that are frequently denounced for being in excess of constitutional restrictions, such as economic regulation or the provision of social services by the federal administrative state.

Where Else Does the Suspension Clause Apply?

The easiest way for the Supreme Court to apply the Suspension Clause at Guantanamo would have been to declare that it was, for all intents and purposes, the equivalent of U.S. territory. Guantanamo may be legally the property of Cuba, but, since the United States has had complete and exclusive control there for the last century, the Court could have said that the Suspension Clause's applicability depends on de facto, not de jure, sovereignty. There would thus be no need to discuss the extraterritorial applicability of the Constitution, since the holding would be that Guantanamo should not be treated as foreign territory.

The Court wisely avoided such a limited finding. The Court found that U.S. control mattered more than de jure sovereignty, but it did not find that de facto *sovereignty* was necessary. Control of a detainee is essential for practical reasons: U.S. courts have no ability to order a foreign official to defend the legality of detention or to order the release of someone illegally or extralegally detained by a foreign government. However, sovereignty—that is, exclusive and unquestioned control over a geographic territory—does not matter insofar as the U.S. courts have the ability to order release. This is why the Supreme Court has held, since the 1957 case *Reid v. Covert*, that U.S. citizens being held by agents of the U.S. government in a foreign territory, such as at a U.S. Air Force base

abroad, can have access to habeas to challenge their detention.[13] The same day as *Boumediene*, the Court released another habeas case, *Munaf v. Geren*,[14] that even extended that concept. In *Reid*, the petitioner was under the complete control of the U.S. Air Force. In *Munaf*, the Court said that, even if the U.S. forces holding a U.S. citizen were part of a coalition of armed forces from many countries, habeas was available to the citizen if the U.S. forces answered to U.S. officials.[15] The Court said that, under the federal habeas statute, all that mattered was that the petitioners were U.S. citizens being held "in the immediate physical custody of American soldiers who answer only to an American chain of command."[16] As long as the courts had the ability to order release, which they unquestionably did in this case because "the Government acknowledges that our military commanders do answer to the President," habeas was available.[17]

Munaf dealt only with jurisdiction under the habeas statute, not the Suspension Clause, and addressed only the rights of U.S. citizens,[18] but the reasoning shows why neither de jure nor de facto sovereignty over a region is necessary for courts to exercise habeas jurisdiction. If U.S. officials are holding someone captive, and the courts have the

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13. 354 U.S. 1.

14. 553 U.S. 674 (2008).

15. *Id.* at 680. The Court found several reasons to distinguish the situation in *Munaf* from that in *Hirota v. MacArthur* (see pages 145–146), including that its practical ability to order release was unquestioned in *Munaf* but uncertain in *Hirota*, and that the petitioners in *Munaf* were U.S. citizens, not foreign nationals. *Id.* at 686–688.

16. *Id.* at 686 (internal quotation marks omitted).

17. *Id.* at 688.

18. "These cases concern only American citizens and only the statutory reach of the writ. Nothing herein addresses jurisdiction with respect to alien petitioners or with respect to the constitutional scope of the writ." *Id.* at 685 n.2. However, see below, pages 268–275, for a discussion of how, despite this claim, *Munaf* prevents the use of habeas (whether under the federal habeas statute or the Suspension Clause) to block the international transfer of a detainee into the hands of torturers.

ability to evaluate the legality of detention and order release, then holding that habeas jurisdiction depends on sovereignty (de jure or de facto) shields those officials from judicial oversight and poses the potential for arbitrary imprisonment. Once the flaws of relying on de jure sovereignty as a basis for habeas jurisdiction became apparent—as the Bush administration's manipulation of the *Eisentrager* rule amply demonstrated—then the Court had to face the reality that de facto sovereignty didn't matter either. In both *Reid* and *Munaf*, the petitioners were being held in U.S.-controlled facilities abroad (in *Reid*, it was a U.S. Air Force base; in *Munaf*, a U.S.-controlled detention camp). These sites may have been run by the United States, but they were located in foreign areas under the control of another, sovereign government. However, at both these foreign locations and at a place like Guantanamo Bay, "a territory … under the complete and total control of our Government,"[19] U.S. courts have the same ability to intervene, hear the arguments of a habeas petitioner, and potentially order release. The foreign location of a petitioner might present prudential reasons for U.S. courts to stay uninvolved or deny relief—including, as was the case in *Munaf*, that a foreign justice system made a legitimate claim that those in U.S. custody violated foreign laws and should be transferred to its control for trial and punishment—but it doesn't suggest that the courts should disclaim jurisdiction entirely.

Thus, the functional test outlined in *Boumediene* does not depend at all on U.S. sovereignty in a region, either de jure or de facto. Rather, it depends on a broader concept: "the nature of the sites where apprehension and then detention took place."[20]

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19. *Boumediene*, 553 U.S. at 771.

20. *Id.* at 766.

Sovereignty would weigh in favor of judicial intervention, but the Court did not foreclose the possibility that the Suspension Clause might apply to foreign nationals detained in geographic regions outside U.S. control but where the detention was, nonetheless, exclusively governed by U.S. forces. Indeed, lower courts have refused to hold that de facto sovereignty was necessary for the Suspension Clause's applicability, finding that such a conclusion would reflect the type of formalistic reasoning that *Boumediene* specifically rejected in favor of a more flexible approach.[21] The functional test suggests that the geographic location of detention is not particularly important for habeas jurisdiction outside of the practical difficulties it might create for the operation of the writ.

It remains to be seen how this flexible approach will play out. The major case to question whether the Suspension Clause applied to foreign detainees outside Guantanamo has come from individuals being held at the Bagram Air Force Base in Afghanistan.[22] The D.C. Circuit found that the extent of U.S. control over Bagram was sufficient to consider it similarly situated to Guantanamo for the purposes of the functional test; however, the court went on to rule that practical circumstances—the third prong of the three-prong functional test—"weigh[ed] overwhelmingly" against finding jurisdiction,[23] since "Bagram, indeed the entire nation of Afghanistan, remains a theater of war."[24] That argument is tenable as long as active fighting is continuing and the United States retains a

21. Al Maqaleh v. Gates, 604 F.Supp.2d 205 (D.D.C. 2009), *aff'd*, 605 F.3d 84 (D.C. Cir. 2010).

22. *Al Maqaleh,* 605 F.3d at 95. The D.C. Circuit reheard the case three years later, after the detainees claimed the circumstances had changed sufficiently to warrant reconsideration, but it again denied their petition. *Al Maqaleh v. Hagel,* 738 F.3d 312 (D.C. Cir. 2013).

23. *Al Maqaleh*, 605 F.3d at 97.

24. *Id.*

heavy military presence there. It will lose its force if the United States continues with its plans to withdraw all but a "vestigial force" by 2016.[25] However, that may also give the executive branch sufficient time to deal with the detainee situation on its own, allowing the courts to abstain from intervening again.

Beyond the Suspension Clause

For the reasons given above, the Court was wise to focus on the Suspension Clause as the source of habeas rights for the detainees. However, it is possible that future interventions will require the Court to move beyond the Suspension Clause to consider whether other individual-liberty protections in the Bill of Rights should apply to detainees abroad. The Court was wise not to engage in such an analysis yet, since it was not at the time necessary to resolve the detainee cases. In many instances, as discussed below, a basic habeas corpus proceeding was sufficient to show that there were no grounds on which to hold several of the detainees. In keeping with the doctrine of constitutional avoidance and, more broadly, with the idea of judicial minimalism, the Court did not engage with the question of whether parts of the Bill of Rights, such as the Fifth Amendment Due Process Clause, should apply at Guantanamo and give to the detainees enumerated rights that could be vindicated in court. This would, as discussed in the last chapter, represent a much greater break with precedent. Less than twenty years ago, in *U.S. v. Verdugo-Urquidez*, the Court reiterated *Eisentrager*'s "emphatic" rejection of the idea "that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United

25. Mark Landler, "U.S. Troops to Leave Afghanistan by End of 2016," *New York Times*, May 27, 2004, http://www.nytimes.com/2014/05/28/world/asia/us-to-complete-afghan-pullout-by-end-of-2016-obama-to-say.html.

States."[26] *Verdugo-Urquidez* dealt not with the Fifth Amendment, but with a Fourth-Amendment challenge to a warrantless search abroad by Drug Enforcement Agency agents. The Court did note that the Fourth Amendment "operates in a different manner than the Fifth Amendment,"[27] which could have opened up an opportunity for it to revisit *Eisentrager*. Instead, it invoked *Eisentrager* and several early twentieth-century precedents to support the broader point that not "every constitutional provision applies wherever the United States Government exercises its power."[28] *Boumediene* shows that some provisions do indeed apply abroad, particularly in areas where the U.S. government has unquestioned control. However, the Court has never reversed *Eisentrager*'s holding about the inapplicability of the Fifth Amendment abroad, even though it has *sub silentio* overturned *Eisentrager's* holding that foreign nationals abroad entirely lack constitutional protections. The Court could, in the future, decide to overturn the rest of *Eisentrager*, in keeping with a more cosmopolitan view about constitutional rights in the modern age, but that would significantly complicate its jurisprudence about the extraterritorial applicability of the Constitution and the limits on the political branches when engaging in foreign policy.

The most difficult question would be how to adapt the large body of Fifth-Amendment case law to the unique situation of foreign detainees. The difficulty the Court faced in the *Hamdi* decision is instructive in that regard. The plurality opinion found that the Due Process Clause placed restrictions on how the government could treat a U.S.

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26. *Verdugo-Urquidez*, 494 U.S. at 269.

27. *Id.* at 264.

28. *Id.* at 269.

citizen accused of fighting for the enemy. However, it provided only the most cursory outline of what kind of process was due to Hamdi and others in his situation. The Court did not find that the extensive case law outlining procedural protections for criminal trials applied to a habeas corpus hearing to determine if a citizen is a continuing threat during wartime. In fact, the plurality opinion specifically rejected that idea, finding that it did not "strike[] the proper constitutional balance" between Hamdi's due-process rights and the government's interests in preventing potential enemies from returning to the battlefield.[29] Instead, the plurality merely said that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[30] The Court did not say what that "fair opportunity" would look like beyond the possibility that some of the procedural protections in a criminal trial—the prohibition against hearsay, for instance—might have to be abandoned.[31] The limited number of U.S. citizens taken into military custody during the War on Terror has meant that the courts have not developed this area of jurisprudence. Hamdi was released soon after the Supreme Court heard his case, with many speculating that the Bush administration did not have enough evidence either to continue holding him as an "enemy combatant" or to try him for a crime.[32] Another American citizen, John Walker Lindt, was captured in Afghanistan fighting for the Taliban, but, rather than being held by the

29. *Hamdi*, 542 U.S. at 532.

30. *Id.* at 533.

31. *Id.* at 533–534.

32. Eric Lichtblau, "U.S., Bowing to Court, to Free 'Enemy Combatant,'" *New York Times*, September 23, 2004, http://www.nytimes.com/2004/09/23/politics/23hamdi.html.

military as an enemy combatant, he was charged in federal court with terrorism-related crimes, accepted a plea bargain, and was sentenced to a federal prison.[33] As previously discussed, the capture and military detention of two U.S. citizens within the United States, Jose Padilla and Ali Saleh Kahlah al-Marri, provoked heated debate and criticism until both were eventually transferred to the civilian justice system, by which they are currently imprisoned. If the due-process protections afforded to citizens under military control are unclear, the Court would be venturing into completely uncharted waters in trying to delineate the protections due to foreign nationals abroad captured during wartime.

The Legacy of *Boumediene*

That this extension of due-process rights was not necessary in *Boumediene* can be seen in how quickly the Supreme Court's decision remedied the situation of many detainees—most notably Lakhdar Boumediene himself. Boumediene and four other detainees picked up in Bosnia and Herzegovina were freed after a federal judge, Richard Leon, found that the government could not substantiate its claims that they had planned to travel to Afghanistan to fight U.S. forces.[34] Another compatriot of theirs, Belkacem Bensayah, was initially denied release after Leon held there was "credible and reliable evidence linking Mr. Bensayah to al-Qaida,"[35] but the government later said that that evidence

33. Jane Mayer, "Lost in the Jihad," *New Yorker*, March 10, 2003, http://www.newyorker.com/magazine /2003/03/10/lost-in-the-jihad.

34. *Boumediene v. Bush,* 579 F.Supp. 2d 191 (D.D.C. 2008). See also Lakhdar Boumediene, "My Guantanamo Nightmare," *New York Times*, January 12, 2012, http://www.nytimes.com/2012/01/08/opinion/sunday/my-guantanamo-nightmare.html.

35. *Boumediene v. Bush,* 579 F. Supp. 2d at 198.

might not, in fact, be reliable, and the D.C. Circuit found there was no justification for his continued detention.[36] Overall, more than two dozen detainees were released in the two years following *Boumediene*.[37] Most of these were easy cases: as the Supreme Court recognized, there was simply no evidence linking some of the Guantanamo detainees to Al Qaeda or the Taliban, and a fair judicial hearing quickly showed that they had been picked up and imprisoned by mistake.

Boumediene also put pressure on the incoming Obama administration to resolve the fate of other detainees who were not a serious threat to the country. In January 2009, Obama ordered a task force composed of officials from several federal agencies to review the status of the detainees and issue recommendations on which could be safely released. The task force concluded that, of the 242 detainees left in Guantanamo in January 2009, over half (126) should be freed.[38]

The main legacy of *Boumediene*, however, may be the long-term effect it has on shaping executive branch detention policy. In particular, it seems unlikely that any future presidents would believe that they can operate outside judicial scrutiny simply by moving their detention facilities abroad, and future presidents will have to take that into account in deciding how and where to house detainees during wartime. Some critics have argued that *Boumediene* will discourage presidents from taking any prisoners of war,[39] but that

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36. *Bensayah v. Obama,* 610 F.3d 718, 726–727 (D.C. Cir. 2010).

37. Center for Constitutional Rights, "Guantanamo Habeas Scorecard," last modified May 30, 2012, http://ccrjustice.org/files/2012-05-30%20Updated%20Habeas%20SCORECARD.pdf.

38. U.S. Department of Justice, Department of Defense, Department of State, Department of Homeland Security, Office of the Director of National Intelligence, and Joint Chiefs of Staff. *Final Report: Guantanamo Review Task Force* (Jan. 22, 2010) at 9–10, http://www.justice.gov/ag/guantanamo-review-final-report.pdf.

39. See, e.g., Judge Janice Rogers Brown's opinion in *Latif v. Obama*, claiming that "*Boumediene*

claim is misplaced: *Boumediene* did not create a choice between detaining or freeing belligerents hostile to the United States, but between, on the one hand, detaining a random assortment of individuals captured haphazardly and often erroneously and, on the other hand, detaining only those whose belligerency has been established. The Court went out of its way to clarify that hostile forces can be detained for the duration of active fighting—but there needs to be a determination that they are actually hostile, and not innocent people who were just in the wrong place at the wrong time. Allowing the executive branch to lock up anyone it chooses without judicial process is precisely the type of arbitrary treatment that so concerned the Framers, for which their solution was a carefully structured federal government operating under constitutional limitations. *Boumediene* reasserts the basic principle that the law, at least to some degree, covers and protects everyone within the ambit of American power: there are no "legal black holes"[40] where the government can do as it chooses, no matter how contrary to constitutional principles.

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fundamentally altered the calculus of war, guaranteeing that the benefit of intelligence that might be gained—even from high-value detainees—is outweighed by the systemic cost of defending detention decisions. While the court in *Boumediene* expressed sensitivity to such concerns, it did not find them 'dispositive.' *Boumediene*'s logic is compelling: take no prisoners. Point taken." 677 F.3d 1175, 1199 (D.C. Cir. 2011) (citations and references omitted).

40. See Steyn, "Guantanamo Bay: The Legal Black Hole."

Postscript: After *Boumediene*

Despite the positive impact of the *Boumediene* decision discussed in the previous chapter, its holding has been blunted by subsequent lower-court decisions. The D.C. District Court and D.C. Circuit Court have handled all the habeas cases coming from Guantanamo, and, whereas the District Court has gone out of its way to give the detainees a fair chance to be heard, the Circuit Court has issued repeated decisions undermining the ability of the detainees to establish their innocence. Two of the Circuit Court's decisions, in particular, call for reconsideration by the Supreme Court, as they prevent the remaining detainees from receiving a fair hearing. Another case, related to the difficult question of whether the judiciary can order the release of a foreign national into the United States over the Executive's objection, was wisely sidestepped by the Supreme Court and subsequently rendered moot; however, future developments may require the Court to consider this issue.

A separate, and troubling, concern is the extent to which the courts have absolved themselves from any responsibility for how the detainees are treated while under U.S. control. The Supreme Court itself has led the way in this problematic development, issuing decisions that prevent detainees from challenging their transfer to other countries where torture is rife and from suing for redress after being subject to torture by U.S. officials. The final section of this Postscript considers these developments and why the courts should feel an ethical obligation to stand up for the principle that torture is antithetical to constitutional values and the rule of law.

The D.C. Circuit Intervenes

In keeping with the Supreme Court's order in *Boumediene*, the D.C. District Court developed procedures for adjudicating the Guantanamo habeas cases, including interpreting what types of actions qualified someone for detention under the AUMF, what burden of proof should be used, and how the adversarial process in these hearings would proceed.[1] The first cases the District Court heard resulted in several detainees being freed, and the United States did not appeal many of those decisions, likely recognizing that the evidence was so sparse that it would be an embarrassment to have another court point out how flawed the government's case against certain detainees had been.

However, the D.C. Circuit began hearing appeals toward the end of 2009 and, in a series of cases, made it much more difficult for the detainees to establish their innocence. Certain specific legal conclusions that the D.C. Circuit reached are problematic, but the real concern is more general: the court's behavior gives the appearance that it is continually "mov[ing] the goal posts"[2] in order to ensure that detainees are not released. The court has framed its approach as revising the evidentiary standards that the district court needs to use, but, in truth, it appears that it is using its purported review of the legal standards simply to reinterpret the facts to reach different conclusions—uniformly, ones that are less favorable to the detainees—than did the district court judges. This is the case even though the court is supposed to be reviewing "the district court's 'specific factual determinations' for clear error," not *de novo*.[3]

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1. See Al-Bihani v. Bush (CMO), 588 F.Supp.2d 19 (D.D.C. 2008) (case management order); Gherebi v. Obama, 609 F. Supp. 2d 43 (D.D.C. 2009).

2. *Latif*, 677 F.3d at 1215 (Tatel, J., dissenting).

3. *Latif*, 677 F.3d at 1178 (majority opinion).

The D.C. Circuit's actions are particularly questionable when one considers the hostility that many judges on the Circuit have expressed toward *Boumediene* and toward the Supreme Court for extending habeas rights to the detainees. Linda Greenhouse of the *New York Times* noted,

> To a startling degree, the conservative judges on the D.C. Circuit have been openly at war with the Boumediene decision. Judge Brown referred in her opinion to the "airy suppositions" of the Supreme Court's majority. Judge A. Raymond Randolph … in a 2010 speech to the Heritage Foundation, pointedly analogized the justices in the Boumediene majority to Tom and Daisy Buchanan in "The Great Gatsby": "careless people, who smashed things up" and who "let other people clean up the mess they made." … Judge Laurence H. Silberman, in a concurring opinion a year ago, described the Boumediene decision as "the Supreme Court's defiant – if only theoretical – assertion of judicial supremacy." … I can't remember such open and sustained rudeness toward the Supreme Court by a group of lower court judges.[4]

Judge Silberman, in fact, went further, openly admitting in the aforementioned concurrence that he did not feel bound to follow the burden of proof (preponderance of the evidence) upon which the Circuit had decided and to which the government agreed[5]—even though preponderance is already a significantly lower threshold than the reasonable-doubt standard used in criminal cases.

The behavior of many D.C. Circuit judges suggests a level of hostility toward the defendants that make a fair hearing impossible. If these judges are unwilling to recuse themselves from Guantanamo habeas cases, the Supreme Court should intervene to reevaluate the evidence, if only to provide reassurance that the process was not rigged against the detainees. The problem of the appearance of bias is amplified by the secretive nature of these particular cases. Because much of the evidence is classified and many of

4. Linda Greenhouse, "Goodbye to Gitmo," *New York Times*, May 16, 2012, http://opinionator.blogs.nytimes.com/2012/05/16/goodbye-to-gitmo.

5. *Esmail v. Obama*, 639 F.3d 1075, 1077–1078 (D.C. Cir. 2011) (Silberman, J., concurring).

the decisions themselves are heavily redacted, the public and court watchers have no way to evaluate fully the validity of the D.C. Circuit's conclusions and whether they represent fair inferences from the available data. Courts publish their opinions because they recognize that transparency is important to ensure both the legitimate workings of the courts and public confidence in their decisions. Where, as here, the government claims that security concerns render such transparency impossible, the public, above all, must have confidence that the court responsible for decision making is acting in good faith. The available evidence suggests otherwise for the D.C. Circuit.

In addition to these general concerns about the fairness of the proceedings in the D.C. Circuit Court, several specific legal holdings by the Circuit have made it impossible for the detainees to receive a fair chance to show their innocence. The standards promulgated by the district court already made it difficult for the detainees. The hearings lack many of the procedural safeguards of a criminal trial—for instance, allowing hearsay when the judge deems it likely reliable and "relevant and material to the lawfulness of petitioner's detention."[6] As noted above, the district court also adopted a preponderance of the evidence standard—that is, that it was more likely than not that the detainee was a member of Al Qaeda or the Taliban—despite the likelihood that such a low burden of proof would result in at least a few innocent people being further detained. However, changes to the hearings' procedures announced in two circuit panel decisions, both written by judges who have been openly critical of *Boumediene*, have gone so far against the general tenor of *Boumediene* and its insistence on fair hearings for the detainees that they should be reversed by the Supreme Court.

6. *Al-Bihani*, 588 F. Supp. 2d at 21 (case management order).

In *Al-Adahi v. Obama*, Judge Randolph claimed that the reason D.C. District Court Judge Gladys Kessler had concluded that detainee Mohammed Al-Adahi should be freed was because she had wrongly evaluated each piece of the Government's evidence individually, rather than seeing how, taken together, they added up to show that Al-Adahi was likely an Al Qaeda member. Randolph claimed that "an error … affects much of the district court's evaluation of the evidence. The error stems from the court's failure to appreciate conditional probability analysis,"[7] that is, the extent to which, because some facts ("events") are dependent on one another, the consideration of such facts taken together leads to a different conclusion than consideration of those facts in isolation from one another. According to Randolph, Kessler had wrongly assumed

> that if a particular fact does not itself prove the ultimate proposition (*e.g.,* whether the detainee was part of al-Qaida), the fact may be tossed aside and the next fact may be evaluated as if the first did not exist…. Having tossed aside the government's evidence, one piece at a time, the court came to the manifestly incorrect—indeed startling—conclusion that "there is no reliable evidence in the record that Petitioner was a member of al-Qaida and/or the Taliban."[8]

However, what Randolph calls "conditional probability analysis" is really just another way of stating that the evidence should be viewed in its totality, rather than piece by piece, because what might be explained as innocent or coincidental by itself can become suspect as coincidences and unlikely events add up. The government had asked Judge Kessler to view the evidence in that way—what it called a "mosaic theory"[9]—and Judge Kessler did, indeed, in her conclusion, look at the sum total of the evidence to see

7. *Al-Adahi v. Obama*, 613 F.3d 1102, 1105 (D.C. Cir. 2010).

8. *Id.* at 1105.

9. *Al-Adahi v. Obama,* 2009 WL 2584685, 4 (D.D.C. 2009).

if it suggested Al-Adahi was likely a member of Al Qaeda. However, Kessler pointed out that

> the mosaic theory is only as persuasive as the tiles which compose it and the glue which binds them together—just as a brick wall is only as strong as the individual bricks which support it and the cement that keeps the bricks in place. Therefore, if the individual pieces of a mosaic are inherently flawed or do not fit together, then the mosaic will split apart, just as the brick wall will collapse.[10]

Thus, Kessler first went through to judge the validity of each individual piece of evidence to determine whether it was reliable. She then considered the evidence in its totality and found that it did not add up to a conclusion that Al-Adahi was more likely than not a member of Al Qaeda. When Randolph applies his "conditional probability analysis" to the evidence, it ends up being only a more skeptical look at Al-Adahi's claims. His methodology does not appear any different than Kessler's: he also looks at individual pieces of evidence, which seems unavoidable in any case asking a judge to reach a conclusion about someone's guilt. However, Randolph reaches different conclusions by crediting the government's evidence at every turn, agreeing with the government's inferences about Al-Adahi's motives (whereas the district court had noted that those inferences often lacked a factual basis) and viewing ambiguous circumstantial evidence (for instance, that Al-Adahi wore "the same model of Casio watch the military has linked to al-Qaida and terrorist activity"[11]) as dispositive. Ultimately, then, no new legal standard was proffered by Randolph; he simply wanted to reverse the factual findings and conclusions reached by the district court. Given his hostility toward the

10. *Id.* at 5.

11. *Al-Adahi,* 613 F.3d at 1109 (D.C. Cir. 2010).

notion of habeas corpus hearings for the detainees,[12] it is hard to have any faith in the legitimacy of his conclusions, especially when they so clearly contradict Kessler's carefully documented findings. The Supreme Court, however, denied certiorari to reconsider the facts of the case.

Al-Adahi signaled to the district court that the Circuit wanted it to take a more skeptical look at any claims of innocence by the detainees. As documented in a study by law professors Mark Denbeaux and Jonathan Hafetz, the message got across. After *Al-Adahi*, there was a "marked difference" in the success of Guantanamo habeas petitioners: they won 19 out of 34 cases (56 percent) before *Al-Adahi*, but only one single case out of the 12 brought in the months after—and that one successful case was reversed by the D.C. Circuit.[13] Noted Denbeaux and Hafetz,

> The differences were not limited merely to winning and losing. Significantly, the two sets of cases were different in the deference that the district courts accorded government allegations. In the 34 earlier cases, courts rejected the government's factual allegations 40% of the time. In the most recent 12 cases, however, the courts rejected only 14% of these allegations.… After *Al-Adahi*, the practice of careful judicial fact-finding was replaced by judicial deference to the government's allegations. Now the government wins every petition.[14]

The Circuit court also used *Al-Adahi* to either reverse or vacate several pre-*Al-Adahi* grants of habeas,[15] finding that "the district court appeared to evaluate the evidence on

12. See Randolph, "The Guantanamo Mess."

13. Mark Denbeaux et al., *No Hearing Habeas: D.C. Circuit Restricts Meaningful Review* (Newark, NJ: Seton Hall University School of Law Center for Policy & Research, 2012), 1, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2145554.

14. Ibid.

15. See Salahi v. Obama, 625 F.3d 745 (D.C. Cir. 2010); Hatim v. Gates, 632 F.3d 720 (D.C. Cir. 2011); Almerfedi v. Obama, 654 F.3d 1 (D.C. Cir. 2011).

the basis of an approach we have since rejected."[16] Again, the issue is not so much that the legal standard is wrong, as there was no clear legal standard issued by the D.C. Circuit: it simply claimed that all the evidence taken together should have led to a different conclusion than the district court reached, as though the district court had never considered that the totality of the evidence might be greater than the sum of its parts. The concern is that, without access to the full body of evidence relied upon by the court, there is no way for the public to evaluate the legitimacy of the Circuit Court's conclusions; there is, however, ample grounds upon which to doubt that the Circuit Court was acting as a neutral fact finder and arbiter.

A second major holding by the D.C. Circuit further biased the habeas hearings against the detainees. The grant of habeas in *Latif v. Obama*, the single successful petition at the district court level in the aftermath of *Al-Adahi*, was reversed by D.C. Circuit Judge Janice Rogers Brown—another judge who had expressed open contempt for *Boumediene*[17]—after she claimed that the district court had erred by "fail[ing] to accord an official government record a presumption of regularity."[18] Much of the documentary evidence in the Guantanamo cases consists of summaries of interviews and interrogations prepared by government officials. Brown argued that, "in the absence of clear evidence to the contrary, courts presume that [public officials] have properly discharged their official duties,"[19] and because "courts have no special expertise in

16. *Hatim*, 632 F.3d at 721.

17. See *Al-Bihani v. Obama*, 590 F.3d 866, 881 (D.C. Cir. 2010) (Brown, J., concurring); *Latif v. Obama,* 677 F.3d 1175.

18. *Latif*, 677 F.3d at 1176. She also claimed, citing *Al-Adahi*, that the district court had used an "unduly atomized approach to the evidence [that] we have rejected." *Id.*

19. *Id.* at 1179 (quoting Sussman v. U.S. Marshals Serv., 494 F.3d 1106, 1117 (D.C. Cir. 2007)).

evaluating the nature and reliability of the Executive branch's wartime records … it is appropriate to defer to Executive branch expertise"[20] and assume that the interrogation records were reliable. Brown clarified that the presumption did not mean that facts in the records were presumed to be true; rather, it "presumes the government official [who prepared a record] accurately identified the source and accurately summarized his statement."[21] However, in the habeas cases, the reliability of the records as accurate records of interviews and interrogations is as important as what the documents themselves say, because often the key piece of evidence offered by the government is a report about a conversation in which the detainee supposedly confessed. District Court Judge Henry Kennedy, Jr. noted that much of the evidence against detainee Adnan Farhan Abd Al Latif consisted of "documents produced and used by government intelligence agencies that are not the direct statements of the individuals whose personal knowledge they reflect."[22] The government's central piece of evidence was a report "in which Latif reportedly admitted being recruited for jihad, receiving weapons training from the Taliban, and serving on the front line with other Taliban troops."[23] However, Latif argued that "his interrogators … so garbled his words that their summary bears no relation to what he actually said."[24] After considering all the evidence, including exculpatory documents put forward by Latif, Kennedy concluded that the report was not

20. *Id.* at 1182.

21. *Id.* at 1181.

22.Abdah v. Obama, 2010 WL 3270761, 2 (D.D.C. 2010), *vacated sub nom.* Latif v. Obama, 677 F.3d 1175.

23.*Latif ,* 677 F.3d at 1178.

24. *Id*.

a reliable record of what Latif had said. By finding that the district court had to presume the regularity of governmental documents—that is, that it had to start from the premise that the summaries of interviews were accurate, even without any corroborating evidence—Judge Brown effectively made it impossible for detainees to rebut any records claiming they had confessed.

In a dissenting opinion, Circuit Court Judge David Tatel noted the flaws in Brown's holding. The presumption of regularity makes sense when "documents [are] produced within a process that is generally reliable because it is, for example, transparent, accessible, and often familiar"[25]; however, there is no reason to make that general presumption for a report

> produced in the fog of war by a clandestine method that we know almost nothing about. It is not familiar, transparent, generally understood as reliable, or accessible; nor is it mundane, quotidian data entry akin to state court dockets or tax receipts. Its output, a [redactions] intelligence report, was, in this court's own words, "prepared in stressful and chaotic conditions, filtered through interpreters, subject to transcription errors, and heavily redacted for national security purposes." Needless to say, this is quite different from assuming the mail is delivered or that a court employee has accurately jotted down minutes from a meeting.[26]

"[A]t a minimum," Tatel concluded, "such reports are insufficiently regular, reliable, transparent, or accessible to warrant an automatic presumption of regularity."[27] And, because of the difficulty that any detainee would have in rebutting the claims of a presumed-truthful report of a confession, "it comes perilously close to suggesting that whatever the government says must be treated as true. In that world, it is hard to see what

25. *Latif v. Obama,* 677 F.3d at 1207 (Tatel, J., dissenting).

26. *Id.* at 1208 (internal citation omitted).

27. *Id.* at 1210.

is left of the Supreme Court's command in *Boumediene* that habeas review be 'meaningful.'"[28]

The practice of the district court judges, it should be noted, was not to be unduly skeptical of the government's documentary evidence. Rather, it was to consider each particular report on a case-by-case basis and decide whether the totality of facts supported viewing it as reliable or not. That is exactly what Judge Kennedy had done, concluding that Latif's testimony, the lack of corroborating evidence, and exculpatory documents all pointed to the conclusion that it was more likely than not that the report was unreliable. The implementation of a bright-line rule preventing district court judges from acknowledging the inherent flaws of these particular reports, which "contain multiple layers of hearsay" and "depend on translators of unknown quality,"[29] so compromises the integrity of these habeas hearings that the Supreme Court should intervene and overturn the holding.

Political Questions Revisited: Court-Ordered Release into the United States

The plight of a group of Uighurs at Guantanamo Bay attracted particularly broad international attention because of the difficult situation they found themselves in after their habeas cases were heard. The Uighurs are a mostly Muslim ethnic minority living in Western China, many of whom have supported a movement to break away from China and form a separate state. The Chinese government has labeled Uighur dissidents as terrorists and pressured the U.S. government to treat them as such. A group of Uighurs

28. *Id.* at 1215 (internal quotation marks and citations omitted).

29. *Id.* at 1210.

who had left China fearing persecution was living in an Afghani camp in 2001 when it was destroyed during the U.S. invasion of Afghanistan to oust the Taliban. Some of the Uighurs fled to Pakistan, where they were captured, accused of having terrorist ties, and subsequently transferred to Guantanamo Bay.[30] The situation of the Uighurs received extensive press coverage because they did not have clear ties to either Al Qaeda or the Taliban, and while the Chinese viewed them as terrorists, others saw them as separatists fighting a government known for its human rights abuses. In addition, even after the U.S. government declared that some at Guantanamo were "no longer enemy combatants"[31]—and likely had never been—they remained imprisoned there because there was nowhere for them to go: the Bush administration refused to let them immigrate to the United States, they feared torture if they returned to China, and no other country was willing, at first, to let them resettle there. To its credit, the Bush and Obama administrations tried to work out arrangements with other countries to resettle the Uighurs cleared of any connection with terrorism, and some were released to countries like Albania.[32] However, others languished in Guantanamo for years.

The Detainee Treatment Act of 2005 (DTA) gave the U.S. Court of Appeals for the D.C. Circuit jurisdiction to hear appeals from Combatant Status Review Tribunals (CSRT). Only eight days after *Boumediene*, a panel for the D.C. Circuit released its first decision reviewing a CSRT decision, that of Uighur detainee Huzaifa Parhat. A CSRT

30. Parhat v. Gates, 532 F.3d 834, 835–838 (D.C. Cir. 2008).

31. Josh White, "Unable to End 'Unlawful' Detention, Judge Says," *Washington Post,* December 23, 2005, A4. This article discusses the case *Qassim v. Bush*, 407 F. Supp. 2d 198 (D.D.C. 2005).

32. Tim Golden, "Chinese Leave Guantanamo for Albanian Limbo," *New York Times,* June 10, 2007, http://www.nytimes.com/2007/06/10/world/europe/10resettle.html.

had concluded that Parhat was "properly detained as an enemy combatant."[33] Echoing previous reports that the CSRTs did not provide detainees a fair opportunity to show their innocence, including Justice Kennedy's denunciation of the CSRT procedures in *Boumediene*, the D.C. Circuit found that the evidence did not support the CSRT's finding, even granting the lax evidentiary standards. Rather than order Parhat's release, though, the panel remanded the case for another CSRT, in the event that the administration had additional evidence not considered by the first CSRT. The panel also noted that the DTA's grant of jurisdiction to the D.C. Circuit to review CSRT determinations did "not expressly grant the court release authority," leaving open the question of what remedy the court was empowered to offer.[34] Recognizing that the CSRT process could drag on and would likely not provide any avenue for Parhat's release for some time, the panel implied that he might want to avail himself of the right to a habeas corpus hearing that was now accessible under *Boumediene*:

> The habeas proceeding will have procedures that are more protective of Parhat's rights than those available under the DTA…. [H]e will be able to make use of the determinations we have made today regarding the decision of his CSRT, and he will be able to raise issues that we did not reach. Most important, in that proceeding there is no question but that the court will have the power to order him released.[35]

In the aftermath of *Boumediene* and *Parhat*, the Bush administration, apparently recognizing that there was no reliable evidence suggesting that the Uighur detainees had committed any terrorism-related offenses, declared it would treat 17 Uighurs "as if they

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33. *Parhat,* 532 F.3d at 835.

34. However, the panel averred that "there is a strong argument (which the Supreme Court left unresolved in *Boumediene* … and which we need not resolve today) that [the authority to order release] is implicit in our authority to determine whether the government has sustained its burden of proving that a detainee is an enemy combatant." *Id.* at 850.

35. *Parhat*, 532 F.3d at 851.

are no longer enemy combatants."[36] The speed with which the government reversed course and cleared the Uighurs after detaining them for seven years suggests that *Boumediene* had a powerful effect on the situation at Guantanamo. At that point, however, the issue shifted to how to effect the Uighurs' prompt release. Much as with the Uighurs earlier deemed to be "no longer enemy combatants," the Bush administration had nowhere to send the Uighurs it deemed eligible for release in 2008. Three years earlier, Judge James Robertson of the D.C. District Court had ruled that, though the continued detention of those "no longer enemy combatants" was "unlawful,"[37] he was powerless to do anything about it:

> It appears to be undisputed that the government cannot find, or has yet not found, another country that will accept the petitioners. Thus, the only way to comply with a release order would be to grant the petitioners entry into the United States…. [A] strong and consistent current runs through [Supreme Court precedent on immigration] that respects and defers to the special province of the political branches, particularly the Executive, with regard to the admission or removal of aliens…. An order requiring their release into the United States—even into some kind of parole "bubble," some legal-fictional status in which they would be here but would not have been "admitted"—would have national security and diplomatic implications beyond the competence or the authority of this Court.[38]

Noting that ordering release into the United States would violate the separation of powers, Robertson concluded that, however unfortunate, "a federal court has no relief to offer."[39] However, when federal Judge Richard Urbina heard the case of Parhat and others in 2008, he concluded otherwise. Citing repeatedly to the recent *Boumediene*

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36. *In Re Guantanamo Bay Detainee Litigation*, 581 F. Supp. 2d 33, 35 (2008).

37. *Qassim*, 407 F. Supp. 2d at 201.

38. *Id.* at 202–203.

39. *Id.* at 203.

decision and its denunciation of attempts by the political branches to exceed the scope of their power, Urbina declared,

> The political branches may not simply … limit[] the scope of habeas review by asserting that they are using their "best efforts" to resettle the petitioners in another country…. These efforts have failed for the last 4 years and have no foreseeable date by which they may succeed. To accede to such manipulation would grant the political branches "the power to switch the Constitution on or off at will...." Thus, the carte blanche authority the political branches purportedly wield over the Uighurs is not in keeping with our system of governance.[40]

Urbina concluded that the judiciary had to be empowered to offer some remedy for unlawful detention, and "[b]ecause their detention has already crossed the constitutional threshold into infinitum and because our system of checks and balances is designed to preserve the fundamental right of liberty, the court grants the petitioners' motion for release into the United States."[41]

The D.C. Circuit overturned that decision, adopting Robertson's reasoning that the judiciary had no authority to order a foreign national to be released into the United States. Because decisions about whether to admit noncitizens into the United States are the prerogative of the executive branch, a panel concluded, "It cannot be that because the court had habeas jurisdiction … it could fashion the sort of remedy petitioners desired."[42] The Supreme Court granted certiorari and vacated the Circuit Court decision, but it found that because a "change in the underlying facts may affect the legal issues"—specifically, more countries had made resettlement offers to the Uighurs—the Circuit Court should

40. *In Re Guantanamo Bay Detainee Litigation,* 581 F. Supp. 2d at 42–43 (quoting *Boumediene*, 553 U.S. at 765).

41. *Id.* at 43.

42. Kiyemba v. Obama (Kiyemba I), 555 F.3d 1022, 1028 (D.C. Cir. 2009).

reevaluate its decision.[43] On remand, the Circuit Court reinstated its previous decision,[44] finding that the legal issues had not changed.

The Supreme Court wisely avoided granting another petition for certiorari.[45] It recognized that the situation was rapidly changing: the Obama administration, recognizing the bad press that the Uighurs were bringing to its failed efforts to close Guantanamo, was negotiating with several countries that would potentially agree to take in the Uighurs. The constitutional issues at stake were profound, involving a complicated separation-of-powers issue, and the Court recognized that it might not be necessary to hear the case at all if the Obama administration's efforts were successful. Indeed, the case became moot because, by the end of 2013, the U.S. government had managed to transfer all the Uighurs to other countries, gaining the Uighurs' consent before going forward with the transfers.[46]

By denying certiorari, the Supreme Court judiciously avoided the potential to elevate the D.C. Circuit's holding into a national precedent. Nonetheless, the precedent remains in the D.C. Circuit that district courts may have to admit their powerlessness in the face of illegal Executive detention of a foreign national if the only possible remedy for that detention is release into the United States against the Executive's wishes. The D.C. Circuit panel thought it axiomatic that the judiciary had no power to overturn a decision of the executive branch to exclude a foreign national from the country. But, as Judge

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43. Kiyemba v. Obama (Kiyemba I), 559 U.S. 131 (2010).

44. Kiyemba v. Obama (Kiyemba I), 605 F.3d 1046 (D.C. Cir. 2010).

45. Kiyemba v. Obama (Kiyemba I), 131 S. Ct. 1631 (2011).

46. Charlie Savage, "U.S. Frees Last of the Chinese Uighur Detainees From Guantanamo Bay," *New York Times*, December 31, 2013, http://www.nytimes.com/2014/01/01/us/us-frees-last-of-uighur-detainees-from-guantanamo.html.

Rogers noted in a separate opinion, that reasoning "would compromise … the Great Writ as a check on arbitrary detention" and "it is not faithful to *Boumediene*"[47] and its claim that habeas must be a flexible, adaptable remedy tailored to particular circumstances of detention. In *Boumediene*, in fact, Kennedy specifically stated that "the habeas court must have the power to order the conditional release of an individual unlawfully detained."[48] Judge Urbina rightly pointed out that it might be the general rule that the executive has discretion over whether to admit a foreign national into the United States, but "exceptional" circumstances might require an exception to that rule, especially if it is necessary to remedy an illegal, indefinite detention.[49] The dire warnings sounded by the D.C. Circuit panel about the intrusion of the judiciary into an area that is "the exclusive province of the political branches"[50] downplayed the equally significant separation-of-powers concern that would occur if a habeas court lacked any power to effectuate the end of an illegal detention.

Torture and the Mistreatment of Detainees

The Guantanamo cases dealt with how long the United States could detain individuals without judicial process. Lurking in the background, however, was a separate concern:

47. *Kiyemba I*, 555 F.3d at 1032 (Rogers, J., concurring in the judgment).

48. *Boumediene*, 553 U.S. at 779. Kennedy goes on to mention that "release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted" (*Id*.), so it is possible that he would view release into the United States against the executive branch's wishes as falling under the latter provision. Nonetheless, the argument of the D.C. Circuit was not that prudential factors made release "not the appropriate" remedy, but that the judiciary lacked the constitutional power to allow an excluded foreign national to enter the United States.

49. *In Re Guantanamo Bay Detainee Litigation,* 581 F. Supp. 2d at 40.

50. *Kiyemba I,* 555 F.3d at 1029.

how those individuals were being treated while under U.S. control.[51] The reality of that treatment stood in stark contrast to President Bush's emphatic declaration that "[t]his government does not torture people."[52]

As discussed in Chapter III, the Office of Legal Counsel (OLC) of the Justice Department produced a series of memoranda in the early years of the War on Terror

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51. My focus in this section is on the routine, daily mistreatment of detainees in U.S. control. I will leave aside here those cases of torture (or "enhanced interrogation procedures") where, some U.S. officials and legal scholars claimed, such treatment might be justified because it was necessary to gather actionable intelligence from high-ranking Al Qaeda operatives in order to prevent imminent, disastrous attacks on the United States—in other words, that there were certain extreme situations that required deviations from the usual, widely accepted prohibitions against torture. Cases of abuse against high-ranking Al Qaeda operatives were rare relative to the more common mistreatment that occurred to ordinary detainees who were not thought to possess any special insight into the workings of Al Qaeda and certainly not knowledge of imminent threats to innocent civilians. Indeed, as noted below, Rumsfeld complained that the Al Qaeda affiliates in Guantanamo were not high enough in the organization's hierarchy to offer any actionable intelligence, and the abuses visited on the Abu Ghraib detainees were not even part of an interrogation plan.

Although I am of the opinion that claims about the necessity of torture under certain particularly dire situations are unsupportable and such treatment remains abhorrent regardless of any claimed benevolent motives of the torturers to save lives, those cases present extensive normative considerations that go outside the scope of this discussion. This is a complicated issue because, as Sanford Levinson has pointed out ("The Debate on Torture: War Against Virtual States," *Dissent* 50, no. 3 (2003): 79–90), anyone who concedes that there might be situations where torture is acceptable to avert a horrific catastrophe—such as frequently raised "ticking-time-bomb" scenarios—can no longer rely on the language of an *absolute* prohibition on torture in U.S. and international law. "[A]ccepting the legitimacy of even one act of torture, under the most extraordinary circumstances, is indeed to junk the prohibition" (Levinson, "Debate on Torture," 82), and, at that point, some non-deontological explanation is needed to explain under what circumstances torture is indeed permissible and how one can stop sliding down the slippery slope to the point that it becomes commonplace. Although there is not room to address these concerns at length here, I should mention that I share Henry Shue's perspective that the factual predicates for ticking-time-bomb arguments are rarely met in real life (indeed, no one can seem to find a real-life case of such a situation), that the removal of the absolute ban on torture threatens much more harm than good, and that "[a]t most, we should consider retrospective forgiveness for someone so convinced that he confronted the rare exceptional case that he was willing to risk severe punishment if decent people were not later persuaded that he had been right." Henry Shue, "Response to Sanford Levinson," *Dissent* 50, no. 3 (2003): 91. See also Henry Shue, "Torture," *Philosophy & Public Affairs* 7, no. 2 (1978): 124–143; and Andrew Sullivan, "The Abolition of Torture," in *Torture: A Collection* ed. Sanford Levinson (New York: Oxford University Press, 2004): 317–327.

Moreover, these arguments about the moral permissibility of torture under certain situations cannot serve as a legal defense of torture as long as the United States remains a signatory to the United Nations Convention against Torture (UNCAT) and has the federal War Crimes Act on its books. Since UNCAT is a "treat[y] made … under the authority of the United States," it is part of "the supreme law of the land" (U.S. Const. art. VI, cl. 2) to which federal officials are bound. And even if the UNCAT is not judicially enforceable on its own (see footnote 50 in Chapter I), federal law—the War Crimes Act—explicitly names torture as one of the "grave breaches" of Common Article 3 of the Geneva Conventions that constitutes a war crime and can be prosecuted in federal court. 18 U.S.C. § 2441(d)(1)(A).

52. Sheryl Gay Stolberg, "Bush Says Interrogation Measures Aren't Torture," *New York Times*, October 6, 2007, http://www.nytimes.com/2007/10/06/us/nationalspecial3/06interrogate.html.

explaining why this conflict was different from previous ones and why the United States should feel free to disregard previous restrictions on its treatment of those captured and detained. A 2003 memorandum by Deputy Assistant Attorney General John Yoo reassured the general counsel for the Department of Defense that detainees in Iraq, Afghanistan, and Guantanamo Bay would be largely outside the protections of the Constitution and both federal and international laws banning torture and war crimes.[53] A 2002 memorandum by Assistant Attorney General Keith Bybee[54] set out to reassure the Bush administration that only the most heinous of interrogation procedures would run afoul of the UNCAT, of which the United States is a signatory, and the U.S.'s federal statute banning torture.[55]

The "Torture Memos" aptly demonstrate why the Federalists were concerned with combining multiple governmental functions (in this case, judicial and executive) into one branch. The OLC leaders went out of their way, not to interpret the torture laws in accordance with their stated goals and underlying principles, but to find a way to reinterpret them to allow any type of interrogation methods the administration wanted to use. Both Bybee and Yoo attempted to portray the UNCAT and the federal torture statute as barring only the most extreme, inhumane, and disfiguring form of treatment. Bybee claimed that, because the torture statute defined torture as "severe" mistreatment,

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53. Yoo Mar. 14, 2003 Memo.

54. Memorandum from Assistant Attorney General Jay Bybee to Alberto R. Gonzales, Counsel to the President. *Re: Standards of Conduct for Interrogation Under U.S.C. §§ 2340– 2340A* (Aug. 1, 2002) at 1, http://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-gonzales-aug2002.pdf.

55. 18 U.S.C. §§ 2340–2340a. The torture statute only applies outside the United States. Within U.S. territory, torture is covered primarily by state laws but also by the federal War Crimes Act (18 U.S.C. § 2441); depending on circumstances, it may also fall under provisions in the UCMJ governing the behavior of the Armed Forces and provisions of federal law criminalizing certain acts of physical violence (18 U.S.C. § 113 *et seq*.).

physical abuse that fell short of creating "pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death," and psychological abuse falling short of that creating "significant psychological harm of significant duration, e.g., lasting months or even years," was perfectly legal.[56]

Courts interpreting the UNCAT, torture statute, and the Torture Victims Protection Act (TVPA)[57]—which creates a civil cause of action to allow victims to sue their torturers in federal court—have reached conclusions at odds with those of the OLC. One District Court said that inadequate medical care, deprivation of basic needs such as water, physical isolation, and threats of execution and physical torture were "more than enough to meet the definition of 'torture' in the Torture Victim Protection Act."[58] Another court found that repeated, believable threats that a prisoner would be killed caused her to suffer "extreme and severe mental anguish and emotional distress" and thus were sufficient, even without actual physical violence, to constitute torture under the TVPA.[59] Although some courts, such as the D.C. Circuit Court of Appeals, have dismissed claims of mistreatment for failing to reach severe-enough proportions to constitute torture under the

56. *Id*.

57. 106 Stat. 73 (1992), codified as note following 28 U.S.C. § 1350. The TVPA provides a cause of action only against agents of a foreign government, but lower-court opinions interpreting the TVPA give an indication of what types of abuses rise to the level of torture under the TVPA and thus would likely also violate the torture statute and UNCAT.

58. *Daliberti v. Republic of Iraq,* 97 F.Supp.2d 38, 48 (D.D.C. 2000).

59. *Aldana v. Del Monte Fresh Produce, N.A., Inc.,* 416 F.3d. 1242, 1252–1253 (11th Cir. 2005). The court dismissed claims of physical abuse but, as in *Price v. Socialist People's Libyan Arab Jamahiriya* (see next footnote), the issue was that the plaintiffs' pleadings lacked sufficient details to show that the physical violence rose to the level of torture, not that the treatment could not rise to that level if the pleadings had been more detailed.

law,[60] none has suggested that abuse must rise to the extreme level outlined by the OLC memoranda in order to count as "torture."

As discussed in Chapter III, the Abu Ghraib scandal broke while the Supreme Court was considering the *Rasul* and *Hamdi* cases. Although the Bush administration claimed to be following international guidelines for the humane treatment of detainees,[61] the coalition force's own investigation[62] found that "numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees"[63] at the detention facility, including

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60.Bybee and Bradbury rely heavily on two such cases from the D.C. Circuit. However, both cases are limited in their holdings. In *Price v. Socialist People's Libyan Arab Jamahiriya,* the court found that the plaintiffs who contended mistreatment had not put forward enough facts about their treatment "to determine from the present complaint [whether] the severity of plaintiffs' alleged beatings – including their frequency, duration, the parts of the body at which they were aimed, and the weapons used to carry them out – … satisfy the TVPA's rigorous definition of torture." 294 F.3d 82, 93 (D.C. Cir. 2002). However, the court did not dismiss the case but, rather, remanded it for further development of the factual record. The case thus stands only for the (unsurprising) proposition that there might be some types of police brutality that do not rise to the level of torture, not for the claim, as Bradbury and Bybee appear to view it, that beatings need to be particularly vicious and sadistic to count as torture. In a second case, *Simpson v. Socialist People's Libyan Arab Jamahiriya*, the D.C. Circuit found that allegations that a plaintiff was "interrogated and then held incommunicado … threatened with death ... if [she] moved from the quarters [where she was] held, and forcibly separated from her husband ... [and unable] to learn of his welfare or his whereabouts … certainly reflect[ed] a bent toward cruelty on the part of their perpetrators" but did not rise to the level of torture. 326 F.3d 230, 234 (D.C. Cir. 2003) (internal quotation marks omitted). Whatever else might be said about the court's holding, it does not shed much light on whether the actions of the CIA and U.S. military during the War on Terror constituted torture because all of the detainees who have alleged torture have described much harsher treatment that invariably included physical assault or extreme psychological abuse. Indeed, the abuses described by Simpson—isolation, threats, and interrogation—reflects the everyday treatment of the U.S.'s detainees at Guantanamo, Abu Ghraib, and elsewhere during the War on Terror; the detainees who have alleged torture have described behavior going far beyond that.

61. "[O]ur values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment. Our Nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva." Bush Feb. 7, 2002 Memo at 2.

62. Major General Antonio M. Taguba, *Article 15-6 Investigation of the 800th Military Police Brigade*, n.d. http://www.dod.mil/pubs/foi/operation_and_plans/Detainee/taguba/TAGUBA_REPORT_CERTIFICATIONS.pdf.

63. *Id.* at 16.

> punching, slapping, and kicking detainees, jumping on their naked feet … [f]orcibly arranging detainees in various sexually explicit positions for photographing ... [f]orcing detainees to remove their clothing and keeping them naked for several days at a time … [a]rranging naked male detainees in a pile and then jumping on them … simulat[ing] electric torture … [u]sing military working dogs (without muzzles) to intimidate and frighten detainees, and in at least one case biting and severely injuring a detainee … [b]reaking chemical lights and pouring the phosphoric liquid on detainees … [b]eating detainees with a broom handle and a chair …[and] [s]odomizing a detainee with a chemical light and perhaps a broom stick….[64]

Human Rights Watch investigated the situation both at Abu Ghraib and at other detention facilities in the region and concluded that there was "widespread and systematic torture and abuse at U.S. detention centers" in Afghanistan and Iraq.[65] The same was true at Guantanamo: Secretary of Defense Donald Rumsfeld approved "the use of guard dogs to induce fear in prisoners, 'stress' techniques such as forced standing and shackling in painful positions, and removing their clothes,"[66] even as he complained that Guantanamo was full of only "low-level enemy combatants."[67]

The Detainee Treatment Act of 2005 was passed, purportedly, to eliminate the mistreatment of detainees as occurred at Abu Ghraib, but it had little effect. The DTA reiterated the UNCAT's ban on cruel, inhuman, or degrading treatment or punishment (CIDTP) by those under the control of the DoD,[68] and it clarified that the DoD could only

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64. *Id.* at 16–17.

65. Reed Brody, *Getting Away with Torture? Command Responsibility for the U.S. Abuse of Detainees* (New York: Human Rights Watch, 2005), 2, http://www.hrw.org/reports/2005/us0405/us0405.pdf.

66. Ibid., 1.

67. Jeff Stein, "Rumsfeld Complained of 'Low Level' GTMO prisoners, memo reveals," *Washington Post,* March 3, 2011, http://voices.washingtonpost.com/spy-talk/2011/03/rumsfeld_complained_of_low_lev.html.

68. Notably, it does not apply to the CIA. Whereas the DOD was in charge of managing the detention facilities that housed the vast majority of those captured and suspected of being terrorists or Taliban fighters, the CIA was charged with the interrogation (and torture) of "high value" detainees who

engage in interrogation techniques authorized by the United States Army Field Manual on Intelligence Interrogation.[69] However, unlike the torture statute or the TVPA, it did not create any legal enforcement mechanism, civil or criminal. In fact, it simultaneously stripped the federal courts of jurisdiction to hear not only habeas cases from the detainees, but "any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba … currently in military custody."[70] It further undermined any attempt at preventing abuses against detainees by shielding U.S. forces who engaged in such treatment from civil and criminal penalties, insofar as they "did not know that [illegal detention and interrogation] practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful."[71] The DTA noted that "[g]ood faith reliance on advice of counsel should be an important factor … in assessing whether a person of ordinary sense and understanding would have known the practices to be unlawful,"[72] suggesting that the torture memos, however misguided or erroneous their legal analyses, could provide a blanket defense for most abuses against detainees.

Although there is no way to be certain, it is likely that the Supreme Court in *Hamdan* found that Common Article 3 of the Geneva Conventions was applicable to the

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supposedly had high-level insight into the workings of Al Qaeda, and it ran a system of secret "black sites" abroad where it kept such detainees for years. See Mayer, *The Dark Side,* Ch. 6–7.

69. Detainee Treatment Act of 2005 § 1002(a), 119 Stat. 2739.

70. *Id.* at § 1005(e)(2), 119 Stat. 2742. The removal of habeas jurisdiction in the DTA and MCA was deemed unconstitutional by the Supreme Court in *Boumediene*, but the Supreme Court has, as of 2014, not addressed the constitutionality of the DTA's removal of jurisdictions over "other action[s]."

71. *Id.* at § 1004(a), 119 Stat. 2740.

72. *Id*.

Guantanamo detainees in part to show that, contrary to Bush and Rumsfeld's belief, the United States was obliged to respect international standards for the treatment of prisoners, including the ban on "outrages against human dignity."[73] *Hamdan* could have been settled solely on the basis of U.S. law—the guidelines for military tribunals under the Uniform Code of Military Justice—yet the Supreme Court went out of its way to show that the Bush administration's claim that the detainees fell outside the protections of international humanitarian law was erroneous. However, several justices simultaneously undermined the value of that precedent by pointing out that Bush could go to Congress for statutory approval of military commission plans that would fall short of Common Article 3 protections. Stevens argued that the United States was bound by the requirements of Common Article 3, but he sidestepped the issue of whether they were judicially enforceable on their own,[74] finding that they applied because the UCMJ predicated any presidential military commissions on "compliance with the law of war," of which the Conventions are a part.[75] In the MCA, Congress explicitly stated that the Geneva Conventions could not be invoked "as a source of rights in any court of the

73. Common Article 3 para. 1(c), *supra* note 86 in Chapter III.

74. See Footnote 50 in Chapter I.

75. *Hamdan*, 548 U.S. at 627. There might be other grounds upon which to hold the Geneva Conventions judicially enforceable, but Stevens managed to avoid that issue through the argument above. In *Eisentrager,* the Court stated in dictum in a footnote that the 1929 Geneva Convention, a predecessor of the Third Geneva Convention of 1949, was not judicially enforceable and "responsibility for observance and enforcement of … rights [granted by it] is upon political and military authorities" (339 U.S. at 789 n.14), not the judiciary. This has produced debate about whether the 1949 Conventions are any different. The District Court in *Hamdan* had found that the 1949 Conventions were self-executing (see Footnote 50 in Chapter I) and thus judicially enforceable, but the D.C. Circuit reversed on the basis of the *Eisentrager* footnote. Stevens avoided this complex issue entirely by concluding that it was irrelevant: the *Eisentrager* footnote was not controlling because the UCMJ requires any military commissions to be in accordance with the law of war, so the Geneva Conventions were implicated through a domestic statute that was unquestionably judicially enforceable.

United States or its States or territories."[76] After the MCA, the United States would theoretically continue to be bound by the terms of the Conventions, but no court could enforce compliance with them: it would be in the hands of the Executive alone to ensure that detainees' rights under international humanitarian law were respected. Given the antipathy with which the Bush administration viewed international law, and given the contrast between the reality of the detainees' treatment and the administration's claims about compliance with international norms, it is hard to believe that the Conventions would, after the MCA, have any practical impact on how the military treated those in its control.

In the *Munaf* case discussed in the Conclusion, the Court further created difficulties for individuals in U.S. custody at risk of torture. In *Munaf,* two American citizens, Shawqi Omar and Mohammad Munaf, had been captured by the U.S.-led Multinational Force in Iraq. There was strong evidence that both had committed crimes in Iraq, and the Iraqi authorities wanted them turned over for trial and punishment. The Court found, as noted previously, that habeas was available to the petitioners, since they were being held by U.S. forces answerable to the president. However, though the judiciary had jurisdiction to consider their cases, the Court also unanimously held that there was no substantive grounds upon which to grant relief, since habeas was not intended to shield individuals from proper punishment for crimes. "[O]ur cases make clear that Iraq has a sovereign right to prosecute Omar and Munaf for crimes committed on its soil,"[77] and "habeas is not a means of compelling the United States to harbor fugitives from the

76. MCA § 5 (a), *supra* note 58 in Chapter VI.

77. *Munaf*, 553 U.S. at 694.

criminal justice system of a sovereign with undoubted authority to prosecute them,"[78] concluded Chief Justice John Roberts in the opinion of the Court.

This conclusion was correct in that habeas is a remedy for illegal or extralegal detention, not legal detention pending a criminal proceeding. However, Omar and Munaf argued that there were extenuating circumstances: they feared being tortured when turned over to Iraqi forces.[79] The Court claimed that the particular situation did not allow it to consider that claim. In general, the Court held, "it is for the political branches, not the Judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments."[80] Moreover, habeas was not an appropriate vehicle with which to challenge extradition because of fears of torture.[81] To its credit, the Court recognized that there might be some circumstances where the judiciary could intervene to prevent a citizen from being tortured. "Petitioners here allege only the possibility of mistreatment in a prison facility; this is not a more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway."[82] Moreover, though Munaf had no constitutional due process right against transfer, the Court left open

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78. *Id.* at 697.

79. A separate issue was that the trials to which they would be subjected lacked the same procedural protections as those guaranteed in U.S. courts. The Due Process Clause of the Fifth Amendment, they argued, granted them substantive rights against being turned over to a foreign nation that would treat them contrary to constitutional protections. The Court disagreed, quoting a century-old precedent: "When an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people." *Munaf*, 553 U.S. at 695 (quoting *Neely v. Henkel,* 180 U.S. 109, 123 (1901)).

80. *Munaf,* 553 U.S. at 700–701.

81. Roberts's claim that the holding in *Munaf* related only to the habeas statute, not to anything "with respect to the constitutional scope of the writ" (see pages 234–235), is clearly inaccurate, since the conclusion that habeas cannot be used to challenge extradition, even in the face of torture, affects the scope of all forms of habeas.

82. *Munaf*, 553 U.S. at 702.

the possibility that a federal law, the Foreign Affairs Reform and Restructuring Act of 1998 (FARRA),[83] might prevent transfer when torture was a likely result. One section of FARRA[84] was passed specifically to implement the UNCAT prohibition against transferring someone to foreign control when torture is likely.[85]

Nonetheless, the thrust of the Court's argument was that it was generally the executive's duty, not the judiciary's, to assess the likelihood of torture in another country and thus the U.S.'s compliance with prohibitions against transferring someone to be tortured; the Court gave great credence to the government's claim (which echoed the language in FARRA) "that it is the policy of the United States *not* to transfer an individual in circumstances where torture is likely to result" and to its conclusion that the Iraqi Justice Ministry's "prison and detention facilities have generally met internationally accepted standards for basic prisoner needs."[86]

It is hard to believe that the Court found these claims at all reassuring. Abuses in Iraqi-run jails were well-documented.[87] Moreover, by the time of the *Munaf* case, it was widely known that, at the same time the U.S. government was publicly proclaiming that

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83. Enacted as Division G (§§ 1001–2813) of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. Law No. 105-277, 112 Stat. 2681.

84. *Id.* § 2242, codified as 8 U.S.C. § 1231 note.

85. "No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." UNCAT art. 3, para. 1, *supra* note 88 in Chapter III.

86. *Munaf,* 553 U.S. at 702 (internal quotation marks and citation omitted; emphasis in original).

87. See, e.g., Jeffrey Fleishman and Asmaa Waguih, "Iraqi Security Tactics Evoke the Hussein Era," *Los Angeles Times*, June 19, 2005, 1; Joseph Logan and Michael Wahid Hanna, *The Quality of Justice: Failings of Iraq's Central Criminal Court* (New York: Human Rights Watch, 2008), http://www.hrw.org/sites/default/files/reports/iraq1208web.pdf. Since his transfer to Iraqi control, Omar claims that he has been badly beaten, and his lawyer has said she has seen physical evidence of abuse. "Shawki Omar, U.S. Citizen Held in Iraqi Prison, Abused and Discriminated against, Wife Claims," CBS News/Associated Press, April 24, 2013, http://www.cbsnews.com/news/shawki-omar-us-citizen-held-in-iraq-prison-abused-and-discriminated-against-wife-claims.

official policy forbade transferring detainees to a country where they would be tortured, it was engaging in a program of "extraordinary rendition" whereby suspected terrorists were secretly captured and given to security forces in countries such as Egypt, Morocco, and Syria, with the understanding that officials there would do the U.S.'s dirty work.[88] In his 2006 book on the extraordinary rendition program, journalist Stephen Grey noted that U.S. officials were well-aware that transferring prisoners to countries where they would be tortured was in clear violation of UNCAT. To get around this provision,

> the United States found a fig leaf to provide legal protection for renditions. Countries like Egypt were asked to provide a promise that they would not torture an individual prisoner. In this way, the United States would argue, there were no grounds for imagining a "substantial risk" of torture. [However,] … CIA insiders … told the White House all along that anyone sent to Egypt would, almost certainly, be treated very brutally.[89]

The extraordinary rendition program received international attention after journalist Jane Mayer published a 2005 expose of it in the *New Yorker*, highlighting the story of a Canadian civilian, Maher Arar, who was captured and sent to be tortured in Syria, where "interrogators … whipped his hands repeatedly with two-inch-thick electrical cables, and kept him in a windowless underground cell that he likened to a grave."[90] According to Mayer, around 150 people had been subjected to rendition by 2005 alone.[91]

To put any faith in the solicitor general's claim that Munaf was not at risk of torture if transferred, the justices would have had to ignore the clear disconnect between the

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88. Mayer, *The Dark Side*, 108–110.

89. Stephen Grey, *Ghost Plane: The True Story of the CIA Rendition and Torture Program* (New York: St. Martin's Griffin, 2007), 41.

90. Jane Mayer, "Outsourcing Torture," *New Yorker*, February 14, 2005, 106. Arar was later absolved of any involvement in terrorism, his name having been given to U.S. officials by two associates while they were being tortured in Syria (Mayer, *The Dark Side,* 129).

91. Mayer, "Outsourcing Torture," 107.

U.S.'s previous claims about its policies and the reality of its behavior during the War on Terror. Three of the justices in *Munaf* did express doubts about saying that individuals were entirely out of luck if turning to the judiciary to prevent being transferred to a country where torture was rampant. In a concurrence joined by Justices Ruth Bader Ginsburg and Stephen Breyer, Justice David Souter said that "nothing in today's opinion should be read as foreclosing relief for a citizen of the United States" who was in the situation that Justice Roberts imagined might provide grounds for judicial intervention: where the government decides to transfer someone, despite concluding that torture would be likely.[92] Souter said that he would even "extend the caveat to a case in which the probability of torture is well documented, even if the Executive fails to acknowledge it,"[93] a likely nod at the reality of how other countries were treating prisoners transferred from U.S. control.

The shortcoming of Souter's argument, besides not commanding a majority of the justices' support, is that it applies solely to U.S. citizens who possess rights under the Fifth Amendment Due Process Clause. "Although the Court rightly points out that any likelihood of extreme mistreatment at the receiving government's hands is a proper matter for the political branches to consider," Souter argued, "if the political branches did favor transfer it would be in order to ask whether substantive due process bars the Government from consigning its own people to torture."[94] Moreover, Souter noted, habeas might not be the proper method for a citizen to challenge such a transfer, but other forms of relief

92. *Munaf*, 553 U.S. at 706 (Souter, J., concurring).

93. *Id.* at 707.

94. *Id.* at 706 (internal citation omitted).

would be available for a citizen to argue for vindication of a constitutional right. The inapplicability of these protections to noncitizens (at least those abroad) points to the shortcoming of the Court's exclusive reliance on the Suspension Clause in *Boumediene* and why (as discussed in the Conclusion) it may want to later consider extending other constitutional protections to noncitizens abroad.

Given the real threat of torture in these situations, the Court's statement that "it is for the political branches, not the Judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments"[95] seems misplaced. Congress has not only ratified the UNCAT but enacted legislation specifically to implement its prohibition against turning prisoners over to another power likely to torture them. Even if habeas was the wrong vehicle through which to vindicate any rights created by those laws, and even if the *Munaf* case sidestepped the question of rights created by FARRA,[96] the Court missed an opportunity to reiterate the principle underlying both the UNCAT and §2242 of FARRA: that delivering someone to be tortured by others, just as much as engaging in torture oneself, is an egregious violation of both international humanitarian norms and U.S. law. Even if *Munaf* did not provide the Court an opportunity to intervene to enforce the UNCAT's and FARRA's prohibitions, there was no reason for the Court to go out of its way to state that "[t]he judiciary is not suited to second-guess … determinations"[97] by the executive branch that a prisoner won't be tortured if transferred

95. *Munaf,* 553 U.S. at 700–701.

96. The Court only speculated about the impact that FARRA might have on Munaf's and Omar's treatment because the pleadings in the case did not address that law in any depth; Roberts thus concluded, "We hold that these habeas petitions raise no claim for relief under the FARR Act and express no opinion on whether Munaf and Omar may be permitted to amend their respective pleadings to raise such a claim on remand." *Munaf*, 553 at 703 n.6 (majority opinion).

97. *Munaf*, 553 U.S. at 702.

to a foreign power's control. The Guantanamo cases stand for the general principle that the Court does play a key role in protecting individual rights even when they implicate foreign policy. Moreover, the confidence the Court placed in the executive branch's professions of good-faith adherence to the U.S.'s policies against torture stands in stark contrast to the skepticism it expressed in the face of other Bush administration claims about detainee policy, such as that the CSRTs offered detainees a fair chance to show their innocence. Given the extent to which the Court has pointed to international law, even when not dispositive of cases, to suggest norms that should guide its jurisprudence,[98] it is disappointing that the Court did not use this opportunity to reiterate that the Executive is bound to uphold the obligations of the UNCAT and FARRA in good faith.

While opening up the possibility that the Court could later find that FARRA created judicially enforceable rights against transfer by the U.S. government into the hands of torturers, the *Munaf* decision set the precedent that the judiciary would not question executive-branch determinations about the likelihood of torture if a prisoner was transferred. This unfortunate holding has led lower courts to make sweeping claims about their powerlessness to intervene to protect individuals against torture. The Uighurs, whose case is discussed above, were afraid that the United States would transfer them back to China, where they justifiably feared, based on China's past treatment toward repatriated Uighur dissidents,[99] that they would be tortured. As part of their petition for a

98. See Chapter I, pages 39–40.

99. According to Human Rights Watch, "Uighurs forcibly returned to China face credible threats of torture" and "disappear into a black hole." Human Rights Watch, "News Release: Thailand: Don't Forcibly Return Uighurs to China," March 14, 2014, http://www.hrw.org/news/2014/03/14/thailand-don-t-forcibly-return-uighurs-china.

writ of habeas corpus, they asked the D.C. District Court in 2009 to order the government to give them a month's notice before any transfer so they could challenge it in court, to which the District Court agreed. A panel for the D.C. Circuit reversed, finding that *Munaf* "precludes a court from issuing a writ of habeas corpus to prevent a transfer on the grounds" that torture might occur.[100] The panel reached this holding over the objection of one judge, who thought it was not faithful to *Boumediene*'s analysis of the demands of constitutional habeas and who did "not believe *Munaf* compels absolute deference to the government on this matter."[101] The Ninth Circuit went even further, finding that *Munaf* required it to absolve the judiciary of any involvement in preventing detainees from being transferred to torturers abroad. The en banc Circuit held that, while "FARRA and its regulations generate interests cognizable as liberty interests under the Due Process Clause"[102] for individuals at risk of being tortured abroad, the *Munaf* holding limited the process due to such petitioners to having the Secretary of State "consider an extraditee's torture claim and find it not 'more likely than not' that the extraditee will face torture

100. Kiyemba v. Obama (Kiyemba II), 561 F.3d 509, 514 (D.C. Cir. 2009). Thankfully, this did not have any practical impact on the Uighur detainees because the government did not repatriate them to China and eventually managed to transfer them to other countries with their consent. Moreover, the D.C. Circuit did not rule out the possibility of a FARRA-based claim, only finding that in the Uighur's case, such a claim was not yet ripe because "Congress limited judicial review [under FARRA's implementation of UNCAT] to claims raised in a challenge to a final order of removal" and "[h]ere the detainees are not challenging a final order of removal." *Kiyemba II,* 561 F.3d at 514–515. However, the Uighur's entire reason for asking for a court order requiring a month's notice was that they were afraid the government would not give them enough notice to challenge such a final order of removal, and thus they would have no way to assert any FARRA-based rights. The D.C. Circuit's opinion completely ignored the reality of this situation.

101. *Kiyemba II,* 561 F.3d at 523 (Griffith, J., concurring in the judgment in part and dissenting in part).

102. This would, of course, require that the particular detainee has rights under the Due Process Clause. This would apply to a foreign national legally admitted to the United States but not, as discussed on pages 237–240, to a foreign national detained abroad.

before extradition can occur."[103] The Circuit Court specifically said that *Munaf* "foreclosed… any inquiry into the substance of the Secretary's declaration,"[104] that is, any consideration of whether the State Department was basing its decision on valid grounds. The Supreme Court denied certiorari to reconsider either the D.C. Circuit's or Ninth Circuit's holdings.[105]

The judiciary's refusal to engage with the question of detainee mistreatment has arisen not only in the context of ongoing threats of torture, but in civil suits for compensation for previous acts of torture. Detainees have seized upon several potential legal avenues to argue that the courts should allow torts against government officials who violated clearly established bans on torture and mistreatment. Foreign nationals have sued U.S. officials by invoking the Alien Torts Statute (ATS), a part of the original Judiciary Act of 1789 giving "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[106] Citizens and some foreign nationals have relied upon the Supreme Court's landmark holding in *Bivens v. Six Unknown Named Agents*[107]—where the Court held that violations of the Fourth Amendment created a cause of action even though the text does not mention civil remedies—and asked the lower courts to extend *Bivens* to include other violations of constitutional rights, including a right to be free from torture based on substantive due process under the Fifth

103. Trinidad y Garcia v. Thomas, 683 F.3d 952, 956–957 (9th Cir. 2012).

104. *Id.* at 957.

105. Kiyemba v. Obama (Kiyemba II), 559 U.S. 1005 (2010); Trinidad y Garcia v. Thomas, 133 S.Ct. 845 (2013).

106. 28 U.S.C. § 1350.

107. 403 U.S. 388 (1971).

Amendment. Neither argument has been adopted by the lower courts. One D.C. District Court judge, James Gwin, agreed with the *Bivens* argument in a suit by a citizen, but the D.C. Circuit reversed, finding that *Bivens* could not be extended to claims regarding substantive due process such as a right to be free from torture.[108] Another D.C. District Court judge, Thomas Hogan, said that he had to dismiss a "lamentable case"[109] in which former detainees outlined vicious treatment while detained in Afghanistan and Iraq. Hogan noted several different reasons for dismissing the suit, including that there were "[s]pecial factors counseling hesitation"[110] in extending *Bivens* to that case, specifically, that "authorizing monetary damages remedies against military officials engaged in an active war would invite enemies to use our own federal courts to obstruct the Armed Forces' ability to act decisively and without hesitation in defense of our liberty and national interests."[111] In the case of Khaled El-Masri, who was picked up and tortured abroad in a CIA black site after being mistakenly suspected of terrorism, the Fourth Circuit dismissed a lawsuit against the CIA after finding that it could not be litigated without exposing sensitive information that could threaten national security.[112] Although some of the courts in these cases have emphasized the lack of statutory or constitutional grounds on which the former detainees could launch a civil suit, an underlying theme has

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108. Doe v. Rumsfeld, 800 F. Supp. 2d 94 (D.D.C. 2011), *rev'd*, 683 F.3d 390 (D.C. Cir. 2012).

109. In re: Iraq and Afghanistan Detainees Litigation, 479 F. Supp. 2d 85, 88 (D.D.C. 2007).

110. *Id.* at 103.

111. *Id.* at 105.

112. The case was dismissed on the basis of the "state secrets doctrine" (or "state secrets privilege") that the Supreme Court recognized in the 1953 case *United States v. Reynolds.* "Under the state secrets doctrine, the United States may prevent the disclosure of information in a judicial proceeding if 'there is a reasonable danger' that such disclosure 'will expose military matters which, in the interest of national security, should not be divulged.'" *El-Masri v. Tenet*, 479 F.3d 296, 302 (4th Cir. 2007) (quoting *U.S. v. Reynolds*, 345 U.S. 1, 10 (1953)).

been that the judiciary had to be cautious in evaluating the actions of executive-branch officials during wartime, and that it would be wise to avoid finding causes of action for foreign nationals that could implicate sensitive national security concerns.

In part, the lower courts' hands have been tied by a combination of Supreme Court cases restricting the scope of the ATS[113] and *Bivens*,[114] and statutes that immunize federal officials from most civil suits.[115] However, there is enough ambiguity in the case law and statutes governing torture-based civil suits that a lower court could find some grounds on which to hold at least some government officials responsible for torture. Indeed, this is what Judge Gwin did under *Bivens,* though the D.C. Circuit later reversed.[116] Moreover, there is precedent for giving a broad reading to statutes that provide civil remedies for torture. The most famous instance in that regard is the 1980 case of *Filártiga v. Peña-Irala*,[117] in which the Second Circuit gave an expansive reading to the ATS, holding that

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113. In *Sosa v. Alvarez–Machain,* the Court held that the ATS "is a jurisdictional statute creating no new causes of action" except those based on a "modest number of international law violations" relating to "norm[s] of international character accepted by the civilized world and defined with [extreme] specificity." 542 U.S. 692, 724–725 (2004).

114. *Bivens* itself is limited to violations of constitutional rights, which, as discussed above, foreign nationals detained abroad largely lack. *Bivens* also suggested that its analysis might not apply when there are "special factors counselling hesitation in the absence of affirmative action by Congress" (403 U.S. at 396), an idea that the Court later adopted in full, see *Butz v. Economou,* 438 U.S. 478, 503 (1978), and *Davis v. Passman*, 442 U.S. 228, 245 (1979). In *Ashcroft v. Iqbal,* 556 U.S. 662 (2009), the Supreme Court both raised the bar on the evidence required to show a clear constitutional violation, as required by *Bivens*, and did away with any "supervisory liability," even when subordinates' actions were known to and approved of by their superiors. In practice, this will likely shield most high-level government officials from civil liability.

115. Most notably, the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. Law No. 100-604 (codified as 28 U.S.C. § 2679), "affords federal employees absolute immunity from tort liability for negligent or wrongful acts or omissions they commit while acting within the scope of their employment." *In re: Iraq and Afghanistan Detainees Litigation,* 479 F. Supp. 2d at 110, with an exception in the statute for civil actions "brought for a violation of the Constitution of the United States" (i.e., *Bivens* suits) or "brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. § 2679(b)(2).

116. See footnote 108 in this chapter.

117. 630 F.2d 876 (2d Cir. 1980).

"deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process by an alien within our borders, [the ATS] provides federal jurisdiction."[118] The Second Circuit concluded its discussion by opining,

> In the twentieth century the international community [came] to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture.... Among the [fundamental human] rights universally proclaimed by all nations … is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him hostis humani generis, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.[119]

The *Filártiga* case, of course, involved very different circumstances than those in the modern-day detainee cases: it was brought against a Paraguayan citizen in the United States, not against U.S. government officials; it had few implications for the U.S. government's foreign policy or conduct abroad; and it was issued during peacetime, rather than in the aftermath of the United States' response to 9/11. Nonetheless, it shows an appeals court's willingness to confront the modern-day realities of torture head on, recognizing, as it did, that torture is a gross affront to basic human rights. The need for civil remedies in instances of torture by U.S. officials during the War on Terror is heightened by the lack of any criminal prosecutions of such officials,[120] despite clear

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118. *Id.* at 878.

119. *Id*. at 890.

120. See Manfred Nowak, Moritz Birk, and Tiphanie Crittin, "The Obama Administration and Obligations under the Convention Against Torture," *Transnational Law & Contemporary Problems* 20 (2011): 41ff.

evidence—indeed, even an admission by the president[121]—that their actions constituted torture and thus are in violation of the federal torture statute, which makes torture a felony. As it currently stands, the unfortunate lesson from the War on Terror is that U.S. government officials can engage in torture, and violate both federal and international law in the process, with impunity. That, as much as arbitrary detention, is an injustice that the Supreme Court should feel moved to correct.

121. "[E]ven before I came into office I was very clear that in the immediate aftermath of 9/11 we did some things that were wrong. We did a whole lot of things that were right, but we tortured some folks. We did some things that were contrary to our values." President Barack Obama, Press Conference of Aug. 1, 2014, transcript, http://www.whitehouse.gov/the-press-office/2014/08/01/press-conference-president.

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